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MULTIPLE AUTHORITATIVE INTERPRETERS OF QUASI-CONSTITUTIONAL FEDERAL LAW: OF TRIBAL COURTS AND THE INDIAN CIVIL RIGHTS ACT

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INTRODUCTION

To what extent may governmental actors other than the Supreme Court function as independent, authoritative interpreters of the federal Constitution? Dicta in the 1958 case of *Cooper v. Aaron*,[1] asserting that the Supreme Court's interpretations bind all other government actors, purported to answer this question. But noted scholars from across the political spectrum—including Professors Michael Stokes Paulsen, Mark Tushnet, Sanford Levinson, and John Harrison—have sharply challenged this view of judicial supremacy and argued that other branches of the federal government not only have the power, but the duty, to serve as independent authoritative interpreters of the Constitution.[2] Even the most ardent advocates of *Cooper*, moreover, cannot deny that the federal executive and legislative branches function as the final interpreters of several

1. 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution.").

2. *See* John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 Cornell L. Rev. 371, 372-74 (1988) (arguing that legislative and executive branches have power to offer independent interpretations); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Geo. L.J. 217, 228-62 (1994) (noting that the executive branch has this power); Sanford Levinson, *Could Meese Be Right This Time?*, 61 Tul. L. Rev. 1071, 1075-78 (1987) (legislative and executive branches). Similarly, Thomas Merrill apparently embraces the view that judicial opinions are "merely explanations for judgments" and accordingly "lack the power to bind the other branches." Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 Cardozo L. Rev. 43, 76, 79 (1993). Also, David Cole has argued that Congress has the power to independently construe due process and equal protection under Section V of the Fourteenth Amendment. *See* David Cole, *The Value of Seeing Things Differently:* Boerne v. Flores *and Congressional Enforcement of the Bill of Rights*, 1997 Sup. Ct. Rev. 31. For other examples of scholarship that, like this Article, consider potential interpreters of the Constitution aside from federal actors, see Mark Tushnet, Taking the Constitution Away From the Courts 181-82 (1999) (the people as interpreters), and Harold J. Krent, *The Supreme Court as an Enforcement Agency*, 55 Wash. & Lee L. Rev. 1149, 1188-1201 (1998) (States). For an unqualified defense of *Cooper*, see Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 Harv. L. Rev. 1359, 1362 (1997).

constitutional provisions[3] and play important roles in construing many others insofar as the Court gives their interpretations near complete deference.[4]

With respect to sub-federal governmental actors, however, it has been settled since the 1816 Supreme Court case of *Martin v. Hunter's Lessee*[5] that States can never serve as independent and authoritative interpreters of the Constitution because of "the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution." Otherwise, noted Justice Story's majority opinion, the "[C]onstitution of the United States would be different, in different [S]tates, and might, perhaps, never have precisely the same construction, obligation or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable."[6]

This Article is the third installment of a project that offers an important refinement of *Martin*'s unqualified rejection of multiple authoritative interpreters of the Constitution at the subnational level.[7] The project demonstrates that Congress may have the constitutional power to delegate independent interpretive authority over select federal constitutional provisions to a small number of "community-

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3. *See, e.g.*, Nixon v. United States, 506 U.S. 224 (1993) (stating that what constitutes the power to "try" impeachments for purposes of the Impeachment Clause is to be determined solely by the Senate); Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849) (holding that the meaning of Guarantee Clause is to be determined exclusively by Congress).

4. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 64-66 (1981) stating:

> Whenever called upon to judge the constitutionality of an Act of Congress—'the gravest and most delicate duty this court is called upon to perform'—the court accords great weight to the decisions of Congress. The Congress is a coequal branch of government whose members take the same oath we do to uphold the Constitution of the United States .... [W]e must have 'due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government .... This is not, however, merely a case involving the customary deference accorded congressional decisions. The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference.

Id. (citations omitted).

5. 14 U.S. (1 Wheat.) 304, 347-48 (1816).

6. *Id.* at 348. For an elaboration of this idea, see 1 Joseph Story, Commentaries on the Constitution of the United States §§ 383-386 (1833).

7. The other two parts are Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 Va. L. Rev. 1053 (1998) [hereinafter Rosen, *Outer Limits*], and Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 Tex. L. Rev. 1129 (1999) [hereinafter Rosen, *Our Nonuniform Constitution*]. One part remains. *See* Mark D. Rosen, *The Possibility of Limited Community-Based Interpretation of the Constitution* (manuscript on file with the Fordham Law Review) [hereinafter Rosen, *Limited Community-Based Interpretation*].

based courts" located in special federal enclaves. Like the criticisms that have been leveled at *Cooper*, the project challenges the deeply held convictions of many that the Supreme Court's constitutional interpretations must be supreme. In addition, creating such community-based courts would be a way to grant extraordinary political power to select communities because the community courts could interpret constitutional provisions, such as the due process and free exercise clauses, in light of their community's values and needs. Recognizing that such remarkable political empowerment is a doctrinal option, even if utilized only infrequently, is critical. Foundational liberal commitments may well require that American society grant extraordinary powers of self-governance to a small number of communities.[8] Thus, even though there is less free land today than in the nineteenth century when communities like the Mormons with ideologies requiring that they be largely free to govern themselves were given land on which they could run their lives as they saw fit,[9] there is a doctrinal vehicle for granting comparable political autonomy to deserving contemporary communities with isolationist needs akin to the Mormons'.[10]

Rather than relying on *Martin*'s untested assumption that multiple authoritative interpreters of the Constitution at the subnational level necessarily would lead to "deplorable" results, this Article empirically examines a regime of multiple authoritative interpreters currently operating on American Indian[11] reservations. Presently, each tribe's courts are empowered to provide their own interpretations of "due process," "equal protection," "search and seizure," and the like, without review from federal courts. The result is that due process means one thing in Manhattan, another in the 25,000 square miles of Navajo land, and yet something else on the Winnebago reservation. Reporting and analyzing the findings of a comprehensive study of tribal case law, this Article demonstrates that the tribal regime of multiple authoritative interpreters works well. This finding is very

8. *See* Rosen, *Outer Limits*, *supra* note 7; Will Kymlicka, Liberalism, Community and Culture 5 (1989) (similar conclusion on the basis of liberal principles); *see also* Robert Nozick, Anarchy, State, and Utopia 297-331 (1974) (similar conclusions derived from libertarian premises); Robert Cover, *Nomos and Narrative*, 97 Harv. L. Rev. 4, 68 (1983) ("[C]onstitutionalism may legitimize... communities and movements."); Abner S. Greene, Kiryas Joel *and Two Mistakes About Equality*, 96 Colum. L. Rev. 1, 4 (1996) (concluding that "the American constitutional order is best understood as... allow[ing] homogenous nomic communities to exercise public as well as private power, provided that the communities exercise public power in a constitutional fashion").

9. *See* Rosen, *Outer Limits*, *supra* note 7, at 1071-74.

10. For an extensive discussion of the criteria for deciding which communities ought to be granted such extensive powers of self-governance, see Rosen, *Outer Limits*, *supra* note 7, at 1089-1106, 1126-27.

11. This Article uses the terms "Native American" and "Indian" interchangeably, reflecting the variety of terms deployed in federal and tribal law.

pertinent to American constitutional law because Congress may have the power to create community-based courts for non-Indians that, like the tribal courts, would be empowered to independently construe select federal constitutional provisions without review from Article III courts.[12] There is a tight analogy between tribal courts and such a regime of multiple authoritative interpreters of the Constitution.[13] For this reason, the Article's findings suggest that such a regime of community-based courts may be able to generate important benefits without yielding the anarchy that *Martin* feared.[14] This finding is germane to community-based courts because an assessment of the likely practical consequences of a regime of multiple authoritative interpreters is relevant as a doctrinal matter to determining the constitutionality of creating community-based courts in the first place.[15]

This Article also sheds critical light on several important issues in federal American Indian law. The Article corrects the acute misunderstanding held by some federal courts that the substantive content of due process and other rights does not vary between Indian country[16] and American society in general. Other federal courts have held that tribal courts may create novel doctrines only when Indian

12. A preliminary sketch of this scheme can be found in Mark D. Rosen, *Defrocking the Courts: Resolving "Cases or Controversies," Not Announcing Transcendental Truths*, 17 Harv. J.L. & Pub. Pol'y 715, 732-33 (1994). The final installment of my project provides a comprehensive doctrinal exposition of the regime of "community-based" courts. *See* Rosen, *Limited Community-Based Interpretation*, *supra* note 7; *see also supra* note 7 and accompanying text.

13. Although a study of State court interpretation of State constitutional provisions paralleling federal provisions also might be instructive, tribal courts are a superior model for community-based courts. Tribal courts have more interpretive freedom than state courts, because no federal constitutional floor of protections exists in Indian country. *See* Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 Vand. L. Rev. 1167, 1218 (1999) ("If a state court is addressing an issue to which both the U.S. Constitution and the applicable state constitution have applicable clauses . . . then the court has some obligation to use the federal authority to define the minimum applicable threshold concerning individual rights."). Furthermore, tribes are more akin to the likely beneficiaries of community-based courts in that both are communities with norms distinctively different from general society; scholars of state constitutional law largely agree that distinctive State norms that inform State constitutional interpretation do not exist. *See* James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 Tex. L. Rev. 1219, 1227 (1998) (concluding that "the character differentiation hypothesis," which seeks to explain state constitutional interpretation on the basis of distinctive state characteristics, "does not hold up"); Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 Va. L. Rev. 389, 389-96 (1998) (same).

14. To be sure, there would remain important differences between tribal courts and "community-based" courts. The limits of the analogy between the two are discussed *infra* Part V.B. and in Rosen, *Limited Community-Based Interpretation*, *supra* note 7, at 121-23.

15. *See* Rosen, *Limited Community-Based Interpretation*, *supra* note 7, at 15, 40.

16. "Indian country" is a statutory term denoting places of tribal jurisdiction. *See* 18 U.S.C. § 1151(a) (1994).

practices differ significantly from those in general American society. This Article will show that this approach is also misdirected. Perhaps most importantly, this Article's findings cast doubt on several proposals to curtail tribal court jurisdiction due to presumed tribal court biases, which have been advanced by several academic commentators and members of Congress. This Article also identifies certain aspects of tribal court practice that merit additional study and suggests that federal funds be allocated to support more widespread publication of tribal court decisions.

Part I of this Article explains the doctrine that has created a regime of multiple authoritative interpreters of quasi-constitutional federal law in American Indian tribal courts. Parts II, III, and IV report and analyze a comprehensive empirical study of all reported tribal court case law over a 13-year period.[17] Part II presents two analytical tools for evaluating the regime of multiple authoritative interpreters in Indian country. The first tool permits analysis of the character of tribal court deviations from standard American doctrines, while the second is a framework for assessing the benefits and costs of the regime. After providing important background information about the study's methodology in Part III, Part IV uses the two analytical tools to analyze tribal court case law. Part IV demonstrates that tribal courts have taken seriously their interpretive tasks and have provided significant protections to individuals against tribal governments. Study of the tribal case law also discloses a remarkable cultural syncretism: tribal courts have deeply assimilated many Anglo political values even though they give them variant expressions that reflect and support tribal culture. These and other findings suggest that the regime of multiple authoritative interpreters in Indian country works well. Part V summarizes the study's findings, explains its relevance to non-Indian communities, and draws on the Article's empirical study to clarify several important issues in the field of American Indian law. A brief conclusion follows.

I. THE REGIME OF MULTIPLE AUTHORITATIVE INTERPRETERS OF FEDERAL LAW IN INDIAN COUNTRY

A. *The Doctrine That Creates Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law*

A combination of six factors has created the regime of multiple authoritative interpreters of quasi-constitutional federal law in Indian country. In this regime, tribal courts are empowered to provide independent interpretations of due process, equal protection, and the

17. There have been a few studies of tribal court case law. *See infra* Part III.C. Though most are very good, none has provided a set of analytical tools for evaluating the findings or a comprehensive study of the reported case law.

like, without review from any Article III courts in virtually all cases. The first factor is that the federal Constitution does not apply to tribal governments.[18] Second, in 1968 Congress imposed statutory obligations on tribal governments in the Indian Civil Rights Act ("ICRA") that virtually track verbatim the language of the Bill of Rights. ICRA statutorily imposed all provisions of the Bill of Rights against tribal governments, with only a few exceptions.[19] Thus, for example, as a matter of federal statutory law "[n]o Indian tribe in exercising powers of self-government shall . . . make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances."[20] Similarly, a tribe may not "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law," or undertake "unreasonable searches and seizures."[21]

The third factor is the Supreme Court's ruling in *Santa Clara Pueblo v. Martinez*,[22] that largely eliminated federal court subject matter jurisdiction over ICRA claims. The only express remedy in Article III courts provided by ICRA is a habeas provision in 25 U.S.C. § 1303, which states that "[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." In *Martinez*, the Supreme Court held that habeas corpus review under § 1303 is the exclusive path for federal court review of alleged violations of ICRA in light of the Act's "distinct and competing purposes" of guaranteeing the rights of individual members of the tribe and encouraging Indian self-government.[23] Federal courts accordingly have subject matter jurisdiction over ICRA claims only when the plaintiff is in "detention," and virtually all ICRA claims—that is, all claims advanced when the plaintiff is not in detention—can be heard only in tribal courts.[24] Derivatively, there can be no appellate review

18. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210-11 (1978); Talton v. Mayes, 163 U.S. 376, 381-83 (1896).

19. The Bill of Rights provisions not statutorily applied against tribes are the prohibition concerning the establishment of religion and the requirements of jury trials in civil cases and appointment of counsel for indigents in criminal cases. *See* 25 U.S.C. § 1301, *et. seq.* (1994); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 63 (1978).

20. 25 U.S.C. § 1302(1).

21. *Id.* § 1302(2), (8).

22. 436 U.S. 49 (1978).

23. *Id.* at 62, 66-70.

24. The Tenth Circuit has created a narrow exception to this doctrine, holding that a federal court can hear an ICRA claim brought by a non-Indian if there is no tribal court forum. *See* Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes, 623 F.2d 682, 683-84 (10th Cir. 1980). Other courts have refused to follow *Dry Creek*. *See, e.g.*, Whiteco Metrocom Div. of Whiteco Indus., Inc. v. Yankton Sioux Tribe, 902 F.Supp. 199, 202 (D. S.D. 1995). The Tenth Circuit itself has narrowed *Dry Creek* to its facts. *See* Enters. Mgmt. Consultants, Inc. v. United States, 883 F.2d 890, 892 (10th

by federal courts of tribal court interpretation of ICRA's substantive provisions apart from circumstances where a federal court has subject matter jurisdiction pursuant to § 1303.[25]

The fourth factor is that even in the post-*Martinez* circumstances where federal courts have jurisdiction over ICRA claims, their jurisdiction is concurrent with tribal courts. For several reasons,[26] most ICRA claims asserted by plaintiffs in "detention"—i.e., by criminal defendants—have been brought in tribal courts. This has provided tribal courts the opportunity to construe even those substantive ICRA provisions typically at issue when there is detention, such as search and seizure and the right against self-incrimination.[27]

The fifth factor is the well-established doctrine that ICRA's statutory terms need not be ascribed the same meaning as their sister terms in the federal Constitution.[28] Tribal courts have the authority to construe ICRA provisions in light of tribal needs, values, customs, and traditions.[29] Although the issue has not been presented in the case law, this tribal interpretive authority presumably would remain even if a federal court were to have construed a particular ICRA provision because the tribal court always would be in the better position to ascertain tribal needs, values, customs and traditions. Thus, it would appear that tribal courts enjoy the power to independently interpret even those ICRA provisions over which federal courts have concurrent jurisdiction.[30]

The sixth and final factor is that each tribe can interpret ICRA's provisions in light of its unique needs, values, customs, and

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Cir. 1989) (limiting *Dry Creek* to its "highly unusual" facts). As previously noted, the result is that virtually all ICRA claims are brought in tribal courts.

25. The federal courts of appeals are without jurisdiction by virtue of the fact that lower federal courts generally are without subject matter jurisdiction under the *Martinez* decision, and there is no special appellate statute granting jurisdiction. *See* 28 U.S.C. § 1291 (1994). Despite the fact that ICRA is federal law, there are no jurisdictional statutes that appear to grant the Supreme Court jurisdiction to review tribal court opinions that are not already subject to federal appellate court review. *See id.* §§ 1253, 1254, 1257, 1258. The question of whether the Supreme Court can review such tribal court decisions has never been presented, and the Court has not heard any challenges to tribal court interpretations of ICRA's substantive provisions since *Martinez*.

26. Several factors likely account for this, the most prominent being: (1) defendants' greater familiarity with, and trust in, tribal courts and; (2) the cost and effort of filing a separate federal lawsuit.

27. *See infra* Part IV.B.4(c) & (f)(i).

28. *See Martinez*, 436 U.S. at 55 ("[R]ecognizing that standards of analysis developed under the Fourteenth Amendment's Equal Protection Clause [are] not necessarily controlling in the interpretation of [the ICRA] . . . .").

29. *See infra* note 82 and accompanying text.

30. *See, e.g.*, Cheyenne River Sioux Tribe v. Williams, 19 Indian L. Rep. 6001, 6002-03 (Cheyenne River Sioux Ct. App. 1991) (applying distinctive tribal interpretation to ICRA guarantee with regard to search and seizure).

traditions.[31] In other words, there is no requirement that ICRA's provisions—even though they are federal law—have a uniform meaning across Indian country. This wise policy reflects the reality that Native Americans are not a single community, but rather a plurality of tribe-based communities.

As a consequence of these six factors, the tribal courts have doctrinally developed the meaning of ICRA's substantive provisions. Furthermore, each tribe has been free to develop its own notions of "due process," "equal protection," "search and seizures," and the like in light of its own needs and values. Thus, although the United States Supreme Court has articulated a specific interpretation of (let's say) due process, there is nonuniformity of interpretation of "due process" as between general society and the enclaves of Indian country. There is also nonuniformity of interpretations between different Native American communities.

B. *Non-ICRA Limits on Tribal Powers*

Tribal court freedom to interpret ICRA does not mean that tribal governments can do whatever they please within Indian country. There are numerous non-ICRA limitations on tribes' powers. These limitations can be divided into two useful general categories: (1) limits on what the governments can do to their own people (Indians who are members of the tribe, generally known as "members" within the parlance of Native American law) and; (2) limits on what the governments can do to "outsiders." Outsiders include Indians who are not members of the tribe, known as "non-members," and non-Indians.

Tribal civil law powers are at their zenith with respect to members because they are limited only by ICRA (and, presumably, by international human rights law).[32] The tribe's criminal authority *vis-a-vis* members, however, is subject to significant limitations; federal courts have exclusive jurisdiction over fourteen statutorily enumerated "major crimes,"[33] and the tribe can imprison members no more than one year for committing all non-major crimes. Tribes' powers *vis-a-vis* outsiders are even more limited. Tribal civil authority over outsiders, both legislative and adjudicatory, is governed by federal common law, as articulated by federal courts.[34] Although tribes' criminal jurisdiction over non-member Indians is identical to

31. *See, e.g.*, Rave v. Reynolds, 22 Indian L. Rep. 6137, 6139 (Winnebago Tribal Ct. 1995) (noting that other tribes' holdings are "not binding on this court").

32. International human rights law, however, provides a floor of protections considerably lower than federal constitutional law.

33. *See* 18 U.S.C. §§ 1152-1153 (1994).

34. *See* Strate v. A-1 Contractors, 520 U.S. 438, 445-48 (1997) (identifying case law defining the "limited circumstances" in which tribes have jurisdiction over outsiders).

their power over members,[35] tribes have no criminal jurisdiction over non-Indians.[36]

II. TOOLS TO ANALYZE ICRA'S REGIME OF MULTIPLE AUTHORITATIVE INTERPRETERS

This part develops two important analytical tools for evaluating ICRA's regime of multiple authoritative interpreters. The first tool is a system for analyzing the nature of tribal court deviations from ordinary federal doctrine. The second tool is a framework that identifies the considerations relevant to judging how well ICRA operates.

A. *The Five Possible Approaches to Past Supreme Court Pronouncements*

When courts other than the Supreme Court are given the power to offer authoritative interpretations of a quasi-constitutional provision, there are five possible approaches they can take to past Supreme Court pronouncements. Clarifying each is important for several reasons. First, the patterns bring order to the tribal case law. Second, each approach is capable of producing a distinct range of variations from ordinary doctrine.

1. A Simple Model for Describing Constitutional Doctrine

]The five approaches to past Supreme Court pronouncements can best be appreciated in relation to a simple model that describes the state of development of any particular constitutional doctrine.[37] Understanding the model, in turn, requires appreciation of the widely discussed distinction between "rules" and "standards."[38] Standards are legal edicts that "describe a triggering event in abstract terms that

35. As is the case with members, tribes can prosecute non-member Indians only for crimes that are not enumerated in the Major Crimes Act. *See* 18 U.S.C. §§ 1152-1153.

36. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that tribes are without power to criminally prosecute non-Indians as a matter of non-ICRA federal law).

37. This is a refinement of a model of constitutional interpretation that I developed in an earlier article. *See* Rosen, *Our Nonuniform Constitution*, *supra* note 7, at 1141-44.

38. There is a long lineage of scholarly literature that discusses rules and standards. *See* Frederick Schauer, Playing By the Rules: A Philosophical Examination of Rule-Based Decisionmaking in Law and in Life (1991); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L.J. 557, 574-77 (1992); Mark D. Rosen, *What Has Happened to the Common Law?—Recent American Codifications, and Their Impact on Judicial Practice and the Law's Subsequent Development*, 1994 Wis. L. Rev. 1119, 1162-64 [hereinafter Rosen, *Recent American Codifications*]; Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 Harv. L. Rev. 24, 57-69 (1992).

refer to the ultimate policy or goal animating the law."[39] Rules, by contrast, are legal edicts that "describe the triggering event with factual particulars or other language that is determinate within a community."[40]

Now to the simple model. All the ICRA provisions take the form of standards that require active interpretation to identify concretely the actions that are required, permitted or proscribed in particular circumstances. The interpretive process can be usefully conceptualized as involving three, and sometimes four, steps. The steps do not necessarily correspond to the chronology of the constitutional provisions' interpretation.[41] Identifying the steps is useful because they provide a means of assessing the nature and scope of tribal court deviations from ordinary doctrine.

First, the provision can be identified with a general "Goal," by which I mean a broad-stroke description of what the provision attempts to accomplish.[42] The Goal sets the parameters within which subsequent doctrinal development occurs.[43] For example, the Goal of the Fourth Amendment has been identified as protecting various "personal and societal values" including a "right to privacy."[44] It is easy to forget that the Goal is almost always a nonaxiomatic translation of the constitutional provision and instead view the contemporarily understood Goal as inevitable.[45] Understanding that the Goal is part of the process of doctrinal development, however, is vital to appreciating the scope of a multiple authoritative interpreter's deviations from ordinary doctrine.

The second step in the interpretive process is the creation of a "Legal Test" to determine whether the identified Goal is met.[46] This

39. Mark D. Rosen, *Nonformalistic Law in Time and Space*, 66 U. Chi. L. Rev. 622, 623 (1999) [hereinafter Rosen, *Nonformalistic Law*].

40. *Id.*

41. *See infra* notes 42-50 and accompanying text.

42. It does not matter for present purposes on what basis the Goal is identified. For one influential topology, see Philip Bobbitt, Constitutional Interpretation 11-22 (1991).

43. This does not mean that identification of the Goal is what happens first in time during the interpretive process—it frequently is not, see *infra* notes 45-46 and accompanying text—but just that doctrinal development is affected by the Goal after it has been identified.

44. Oliver v. United States, 466 U.S. 170, 177, 181-83 (1984).

45. This explains why the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1872) Court's understanding of the Goal of equal protection (that equal protection is intended solely to protect African-Americans) and Professor Currie's suggestion that due process could plausibly be understood as limiting only the executive branch, see David P. Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789-1888 272 (1992), typically are shocking to people.

46. Frequently the identified Goal implies a limited set of possible Legal Tests, but it also frequently is the case that two or more possible Goals could lead to an identical Legal Test, the significance of which is that the chosen Goal is reflected only in the Legal Test's application.

second step is necessary because the Goal inevitably is too abstract and, consequently, unworkable for the judiciary's institutional needs of having a shorthand method for decisionmaking that identifies only a subset of the infinite facts that characterize any given circumstance as legally relevant. The test almost always includes one or more "Standards." For example, the Supreme Court has translated the previously mentioned Fourth Amendment Goal into a Legal Test comprised of several Standards that ask whether "the individual manifested a subjective expectation of privacy in the object of the challenged search" and whether society is "willing to recognize that expectation as reasonable."[47] This Legal Test helps to particularize the Goal, but by deploying Standards such as "reasonable" and "expectation of privacy" still leaves uncertainty as to what satisfies the test.

Step three describes what occurs to the Legal Test's Standard over time. As the Standard is applied over a series of cases, it almost always becomes increasingly rule-like. This occurs because cases, by nature, are disputes that involve particular facts. As the cases are decided they become examples of what, as a concrete matter, the Standard means.[48] I dub this process the "Rulification of the Standard" and will call step three's product a "Rulified Standard." For example, do people have a "subjective expectation of privacy" in open fields? The Court has said no.[49] In curtilage surrounded by a high double fence? Not from a naked-eye observation taken from an aircraft, according to the Supreme Court.[50]

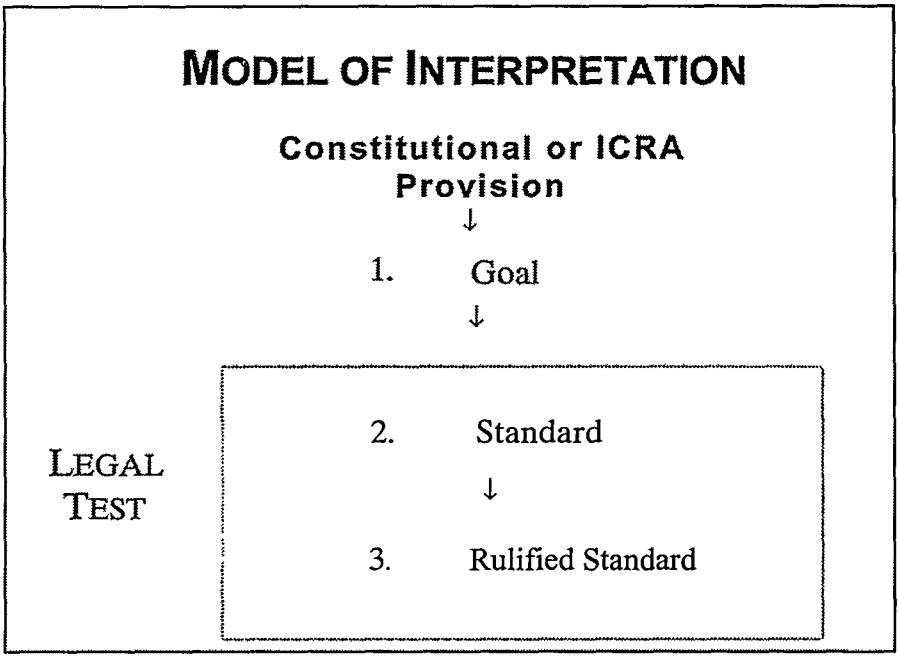
This simple model of interpretation can be graphically depicted as follows:

47. California v. Ciraolo, 476 U.S. 207, 211 (1986).

48. Over time, in fact, often the facts of decided cases substitute for the abstract Standard, which is reflected in the phenomenon of courts reasoning analogically from the facts of previously decided cases rather than considering the Standard. It is worth noting that steps three and four occur in jurisprudential systems (like that of the United States) where cases are reported and there is a strong expectation of consistency from case to case. They would not occur in a legal culture where case law is not reported or where judges are entrusted to make their best judgments in the case at hand.

49. *See Oliver*, 466 U.S. at 177.

50. *See Ciraolo*, 476 U.S. at 213-14.



2. Five Possible Approaches to Federal Case Law

It is useful to distinguish among five possible approaches that can be taken by the tribal courts when they exercise their power to independently construe quasi-constitutional provisions.

First, the tribal court could ignore altogether the federal case law and proceed to construe the provision wholly on its own.[51] Let us call this the "Tabula Rasa" approach.[52] For example, in *Navajo Nation v. Crockett*,[53] the tribal court looked to "Navajo common law" rather than American case law to define the contours of free speech. The

51. It should be noted that the mere fact that a tribal court does not cite to federal case law does not mean it is engaging in Tabula Rasa. Federal standards sometimes become so ingrained that courts invoke the formula (for example, due process requires notice and hearing) without bothering to cite to federal case law. Such courts do not ignore the federal case law but have deeply assimilated it. *See infra* note 203-23 and accompanying text. Sometimes it can be difficult to distinguish Tabula Rasa from this type of deep assimilation.

52. To be sure, Tabula Rasa represents an idealization. Tribal court justices frequently are aware of at least some of the Supreme Court precedent and hence cannot be said to construe ICRA provisions without reference to the federal case law, even if federal cases are not mentioned. Even so, the mere effort to take a Tabula Rasa approach to interpreting a provision is significant for purposes of understanding the nature of the resulting jurisprudence. Also, as we will see, it is sometimes the approach taken by tribal courts and appears to largely succeed insofar as courts sometimes articulate truly novel understandings of the provisions in question.

53. 24 Indian L. Rep. 6027, 6028 (Navajo 1996).

court noted that a Navajo has a "fundamental right to express his or her mind by way of the spoken word and/or actions."[54] But this right is limited insofar as there is "freedom with responsibility."[55] The Navajo concept of responsibility can impose permissible content limitations. For example, "on some occasions, a person is prohibited from making certain statements, and some statements of reciting oral traditions are prohibited during specific times of the year."[56] Responsibility also can impose limits with respect to style of presentation; thus, "speech should be delivered with respect and honesty."[57] Finally, Navajo responsibility can impose "another limitation on speech, which is that a disgruntled person must speak directly with the person's relative about his or her concerns before seeking other avenues of redress with strangers."[58] In the employment context, for example, the Navajo court held that an employee dissatisfied with his supervisor "should not seek to correct the person by summoning the coercive powers of a powerful person or entity" but instead must first engage in the process of "talking things out" with his superior.[59] As *Crockett* demonstrates, and as intuition would suggest, the Tabula Rasa approach can create doctrines that are virtually unrecognizable to students of American constitutional law.[60]

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54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 6029.
58. *Id.*
59. *Id.* The process of "talking things out" must be utilized unless the employee's dissatisfactions concern matters of "public concern." *Id.*
60. Generally, the first time a court proceeds to construe a provision via the Tabula Rasa approach it does not create "doctrines," but instead produces an *ipse dixit* opinion in which the tribal court almost tautologically identifies a set of facts as violative of an ICRA provision without attempting to formulate a Legal Test. *See, e.g.*, Rave v. Ho-Chunk Nation Gaming Comm'n, 25 Indian L. Rep. 6042, 6044 (Ho-Chunk Nation Tribal Ct. 1997) (identifying what a lower court had done and asserting that "[t]his action is without foundation in law. It is arbitrary. It is capricious. It is an abuse of discretion"). Although such an approach might appear at first to be lawless, it parallels the reasoning found in the early Supreme Court opinions that provide the first applications of constitutional provisions. *See, e.g.*, Boyd v. United States, 116 U.S. 616, 633 (1886) (deploying similarly conclusive analysis bereft of any usable rule in early self-incrimination decision) Springer v. United States, 102 U.S. 586, 594 (1880); (same in early due process opinion); Currie, *supra* note 45, at 443 (stating that the Supreme Court's analysis in its first First Amendment case was "wholly conclusory," noting considerations not taken account of by the Court, but then concluding "[a]ll of this, however, has developed through years of experience in first amendment litigation and could scarcely have been expected to emerge full-blown in the Court's first encounter with the clause"). Such a pattern of *ipse dixit* outcomes followed by rule synthesis is not surprising and is consistent with the common law method of lawmaking that characterizes judicial constitutional interpretation. *See generally* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877 (1996). Typically, it is not until there has been a minimum number of cases decided that common law courts feel comfortable attempting to create Legal Standards or, frequently, Goals.

The remaining four approaches involve varying degrees of engagement with, and adoption of, the federal case law. The second approach can be conceptualized as the polar opposite of Tabula Rasa. Under it, the tribal court completely incorporates the federal doctrine to the extent the doctrine has been developed; the tribal court adopts the Goal, Standard, or the Rulified Standard. I will call this "Incorporation." It is important to note that when the tribal court utilizes the Incorporation approach, the tribal court is not superfluous. In respect of this, it is useful to distinguish between two types of Incorporation. Sometimes tribal courts adopt the federal case law without explanation[61]—what I will label "Stock Incorporation." Stock Incorporation is a mode of interpretation in which tribal courts provide the least value added, but even in these circumstances, tribal courts are not wholly superfluous insofar as Incorporation is *their* decision, thereby advancing the value of self-government. More frequently, however, tribal courts actively fit the federal doctrine to the tribal context—what I call "Fitted Incorporation." This can take several forms. First, tribal courts frequently engage in Incorporation only after establishing that the federal approach fits well within the tribal context,[62] a determination that an ordinary federal court might not be capable of making.[63] Second, the tribal court that Incorporates

61. *See, e.g.*, MacDonald v. Navajo Nation, 18 Indian L. Rep. 6003, 6007-08 (Navajo 1990) (undertaking close analysis of federal self-incrimination case law to determine whether the protection applies to personal diaries; "[w]hile the thrust of Supreme Court decisions appears to be approaching such a holding, we are not prepared to conclude that such is the actual state of the law").

62. In *Cheyenne River Sioux Tribe v. Williams*, 19 Indian L. Rep. 6001, 6002-03 (Cheyenne River Sioux Ct. App. 1991) (citing Oliver v. United States, 466 U.S. 170 (1984)), for example, the tribal court adopted the federal "open fields" search and seizure rule—under which an "open field is neither a house nor an effect, and therefore the government's entrance upon open fields is not an unreasonable search within the meaning of the fourth amendment"—only after determining that the federal doctrine was the "most appropriate and just doctrine to apply in the tribal context."

63. The recognition that general courts may not be capable of discerning the needs of an idiosyncratic community has led the Supreme Court both to limit the jurisdiction of general federal courts, *see, e.g.*, Weiss v. United States, 510 U.S. 163, 166-69 (1994) (concluding that ordinary federal courts are without "competence" to make what are "essentially military judgments" and holding that enlisted persons may not bring *Bivens* actions against their superior officers in federal courts), and to expand the jurisdiction of community tribunals to adjudicate matters affecting the community. *See e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71 (1978) (holding that federal courts have only limited subject matter jurisdiction with respect to ICRA claims because "resolution of statutory issues under [ICRA] ... will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts"). Similarly, in *Corp. of the Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints v. Hodel*, 830 F.2d 374 (D.C. Cir. 1987), the court upheld, against an equal protection challenge, the American Samoa territory courts, whose rulings could not be reviewed by Article III courts. The *Hodel* court cited to the reasons adduced by the district court such as "American Samoa's relatively small size" and "its desire for autonomy in local

a federal doctrine that is not developed far beyond a Standard still has to apply the Standard to the tribal context, and the tribal court is probably far better suited to undertaking this central aspect of legal interpretation than a general federal court.[64] Third, tribal courts that Incorporate may conceptualize the federal approach as being consistent with, or derivable from, tribal culture and values, and such a way of conceptualizing the legal rule may have important social meaning to the tribal community that would be lost if the adjudication took place in a general federal court.[65] Although the federal Legal Test is adopted in all three instances of Fitted Incorporation, the tribal court plays an important role in bringing together tribal and Anglo traditions.

The remaining three approaches involve rejecting federal doctrine to varying degrees as being ill suited to the tribal context. Under the third approach, the tribal court adopts the federal Standard but disregards the Rulification of the Standard.[66] Instead, the tribal court applies the Standard in a manner that is closely tailored to the context-at-hand. I will call this "Tailoring." Tailoring is well illustrated by the case of *Colville Confederated Tribes v. Bray*,[67] where the issue was what due process protections nonwarrant arrestees enjoyed. Federal case law had established that constitutional due process requires that defendants arrested without a warrant be brought "promptly" before a judge, and that this meant forty-eight hours absent exceptional circumstances.[68] The tribal court accepted the Supreme Court's Goal and Standard, but not its Rulified Standard. It invoked the Standard, that there be a "reasonable accommodation of the competing interests,"[69] and ruled that the tribal ordinance's seventy-two hour requirement satisfied the "promptly" requirement. The tribal court's requirement avoided having to hold weekend court for Friday night arrestees, and "[t]he cost to the Tribes

affairs" then noted that the scheme was a rational means of respecting Samoan traditions concerning land ownership. Congress' policy of respecting traditional land ownership "could be frustrated if the High Court's judgments in such cases were reviewed by one of the circuit courts of appeal, which are Article III courts but which lack expertise in Samoan law and culture." *Id.* at 386-87.

64. *See supra* note 63.

65. I develop this point in greater detail. *See infra* notes 121-28 and accompanying text.

66. In practice, it can be difficult to distinguish between Tailoring and Fitted Incorporation because it is not always clear whether a Standard has become a Rulified Standard. Though the precise characterization may be a close call, the model of interpretation presented here is useful because locating an interpretation on the border between Tailoring and Incorporation still tells one much about the nature of the court's reasoning and of the resulting deviation from ordinary doctrine.

67. 26 Indian L. Rep. 6061 (Colville Tribal Ct. 1999).

68. *Id.* at 6061 (citing Gerstein v. Pugh, 420 U.S. 103, 113-18 (1975)).

69. *Id.*

for this procedure would seem to outweigh the extra 24 hours for a defendant."[70]

The fourth interpretive technique is to adopt federal courts' description of the Goal but reject the federal courts' Standard. Call this method "Re-standardizing." For example, in *Hopi Tribe v. Lonewolf Scott*,[71] the Hopi tribal court accepted that the Goal of due process's void for vagueness doctrine is to ensure that persons have fair notice of what conduct is criminally sanctionable. But instead of deploying the ordinary Standard—an objective test that looks to the mere "possibility of discriminatory enforcement" and lack of notice[72]—the court applied a subjective test and analyzed how the Native American community in question understood the ordinance and how the tribal authorities had applied it.[73]

The fifth and final approach is to replace the Goal identified by the Supreme Court. Call this "Re-Targeting." An example of Re-Targeting can be seen in *Downey v. Bigman*,[74] where the Navajo Supreme Court decided that the Goal of the jury right was not only to preserve litigants' rights, but also to advance the tribal community's interest in "participatory democracy," that is, participation in law-making and law-application. This represents a Re-Targeting because the United States Supreme Court's stated Goal behind Sixth and Seventh Amendment jury rights concerns the rights of the litigant and the integrity of the legal system, not rights of jurors to participate in government.[75] Re-Targeting of the jury right led the tribal court to create a new jury procedure in which the jury was empowered to direct questions to witnesses.[76]

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70. *Id.*

71. 14 Indian L. Rep. 6001, 6005 (Hopi Tribal Ct. 1986).

72. *See, e.g.*, Gentile v. State Bar of Nevada, 501 U.S. 1030, 1082 (1991) (O'Connor, J., concurring).

73. *See Lonewolf Scott*, 14 Indian L. Rep. at 6005.

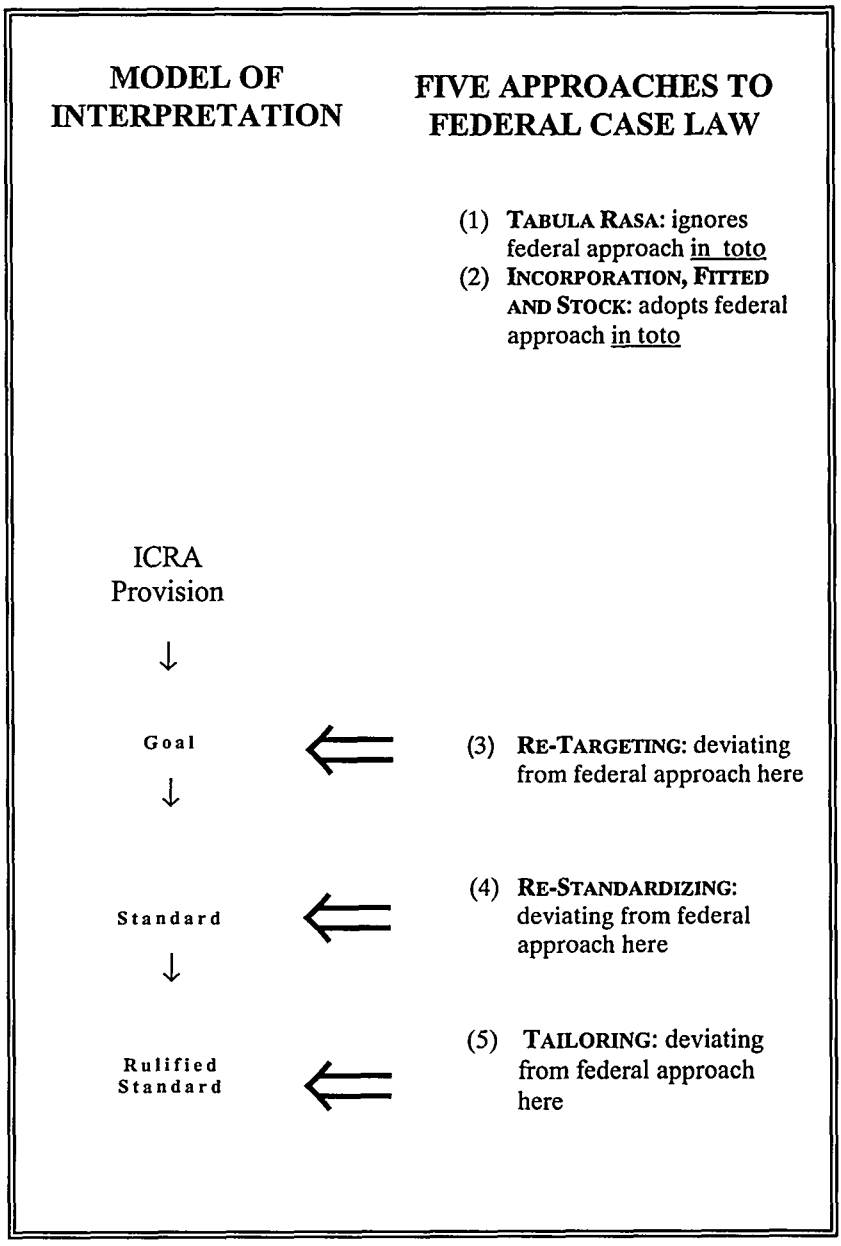
74. 22 Indian L. Rep. 6145 (Navajo 1995).

75. *See, e.g.*, Lewis v. United States, 518 U.S. 322, 335 (1996) (Kennedy, J., concurring) ("The primary purpose of the jury in our legal system is to stand between the accused and the powers of the State."); Taylor v. Louisiana, 419 U.S. 522, 530 (1975) ("The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge."); Colgrove v. Battin, 413 U.S. 149, 157 (1973) ("[T]he purpose of the jury trial in criminal cases [is] to prevent government oppression and, in criminal and civil cases, to assure a fair and equitable resolution of factual issues." (internal citations omitted)). The Court, on occasion, has alluded to the benefit to the community of participating in law-making, *see, e.g.*, J.E.B. v. Ala. *ex rel.* T.B., 511 U.S. 127, 140 (1994), but this has not referred to citizens' roles as lawmakers but instead to the harm caused by "the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders." *Id.*

76. *Downey*, 22 Indian L. Rep. at 6146-47.

All that remains is the definition of a few more terms that cut across the five approaches. Under all approaches except for Tabula Rasa, the tribal court "adopts" federal case law. Under Fitted Incorporation, Tailoring, Re-standardizing, and Re-Targeting, the tribal court also "adapts" the federal law to the tribal context. I will refer to the last set of interpretive approaches collectively as "Adapted Adoption." Finally, because tribal courts sometimes cite to other tribal court opinions as precedent, it is important to distinguish between "subjective" and "objective" adapted adoption. "Subjective Adoption" refers to cases where the tribal court itself looks to federal case law and either Tailors, Re-standardizes, Re-targets, or Incorporates. "Objective Adoption" refers to a tribal court's *de facto* adoption of the federal doctrine without its having cited to federal law (as, for instance, when the tribal court cites to tribal case law as precedent that itself utilized Subjective Adoption).

To summarize, the five approaches that a multiple authoritative interpreter can take can be mapped onto the model of interpretation as follows:


MODEL OF INTERPRETATION
FIVE APPROACHES TO FEDERAL CASE LAW
(1) TABULA RASA: ignores federal approach in toto
(2) INCORPORATION, FITTED AND STOCK: adopts federal approach in toto
ICRA Provision
Goal
Standard
Rulified Standard
(3) RE-TARGETING: deviating from federal approach here
(4) RE-STANDARDIZING: deviating from federal approach here
(5) TAILORING: deviating from federal approach here

3. Comparing the Five Approaches

Of the five approaches, Tabula Rasa and Re-Targeting can potentially create the most radical departures from the meaning ascribed to the Bill of Rights by federal courts. After all, Incorporation, Tailoring, and Re-standardizing accept the Goal identified by the Supreme Court as representing the principle behind the ICRA provision; what drives Tailoring and Re-standardizing is simply the view that realizing the Goal in the context-at-hand requires a deviation from behaviors that ordinarily are constitutionally required, permitted, or proscribed. By contrast, Re-Targeting recasts the Goal and thereby broadens the range of possible deviation, and Tabula Rasa allows for this as well. Incorporation self-evidently leads to the smallest deviation from the ordinary federal case law: none.

The differences between Tabula Rasa and Re-Targeting, in terms of the potential deviation from ordinary doctrine, are subtle. On the one hand, Tabula Rasa provides the same opportunity to alter the Goal as does Re-Targeting. On the other hand, Re-Targeting does not necessarily occur in Tabula Rasa. It is possible, after all, that the tribal court could independently determine that an ICRA provision has the same Goal or even Legal Test as does its Bill of Rights counterpart. There is, however, one respect in which Tabula Rasa provides a greater possibility for deviation than Re-Targeting. Because Re-Targeting is performed in relation to the federal case law, it is possible (if not likely) that the Goal identified by the Supreme Court, even though it is rejected by the court that Re-targets, still plays a role in limiting the range of considered goals. As a cognitive matter, the identified Goal might circumscribe the range of imagined alternatives.[77] To the extent that a tribal court could really approach an ICRA provision without preconceived notions provided by federal case law—an uncertain possibility, to be sure—the Tabula Rasa approach is not so limited.

Though more limited than Re-Targeting and Tabula Rasa in terms of creating deviations, Tailoring and Re-standardizing also have the potential to create significant departures from ordinary requirements. This can be illustrated most dramatically by examining Tailoring, the method that generates the fewest deviations from ordinary constitutionalism. Tailoring is the most limited approach because it accepts more of the teachings of federal case law as relevant to the context-at-hand (adopting both Goal and Standard) than do the other methods. Even so, Tailoring can cause immense deviations from what is ordinarily permitted or proscribed. The magnitude of the departure is dependent on the character of the Standard and on how

77. *Cf.* Rosen, *Recent American Codifications*, *supra* note 38, at 1217-52 (observing a similar phenomenon that results from codifying common law).

community-specific the court is willing to tailor. If the Standard itself contains broad standards and the court does a highly context-sensitive analysis, Tailoring can produce profound deviations. For example, Tailoring has been utilized to uphold prior restraints in select places in this country.[78]

B. *Normative Framework to Analyze the ICRA Regime*

This subsection creates a framework for evaluating ICRA's regime of multiple authoritative interpreters.

1. Potential Benefits

Three core benefits result from ICRA's regime of multiple authoritative interpreters. First, it increases tribes' powers of self-governance. Second, it permits variations in governmental structures and accordingly extends the possible range of institutional diversity. Third, and derivative of the first two, ICRA's regime of multiple authoritative interpreters enables communities to flourish that otherwise might not because some tribal communities' very self-definition turns on having the power to govern themselves or requires governmental institutions that would not be compatible with standard federal court interpretations of the Bill of Rights.

ICRA's regime of multiple authoritative interpreters has the potential of bringing another benefit to non-Indian society. It can help maintain, and may even assist, the legal imagination in general society. The existence of precedent, particularly longstanding precedent, may hinder people's ability to recognize a doctrine's noninevitability and the fact that there are alternatives to it.[79] ICRA's regime of multiple authoritative interpreters can serve as a correction for this tendency because alternative interpreters, though not deciding that the Supreme Court's interpretation is wrong, may construe or apply an ICRA provision that is analogous to a Bill of Rights provision in a manner at variance from the Supreme Court's interpretation. Deviations from the ordinary in any of the ways discussed above—even Tailoring—can be illuminating[80] in much the way that comparative law can be: it can provide alternative doctrinal

78. *See* Rosen, *Our Nonuniform Constitution*, *supra* note 7, at 1148-49.

79. *See* Rosen, *Recent American Codifications*, *supra* note 38, at 1199-1252 (noting similar phenomenon in context of codification); *cf.* Eric Talley, *Precedential Cascades: An Appraisal*, 73 S. Cal. L. Rev. 87, 90-105 (1999) (discussing the possibility of similar phenomenon of "precedential cascades," though ultimately concluding that such events are unlikely).

80. Seeing the Tailoring performed by one of the tribal courts can be instructive to courts in general society, for example, insofar as courts frequently "favor inductive reasoning from already decided cases over deducing concrete requirements from legal rules or standards in matters of first impression" and accordingly overlook the possibility of Tailoring. Rosen, *Our Nonuniform Constitution*, *supra* note 7, at 1173.

means of realizing similar objectives and help society recognize the nonaxiomatic assumptions that are incorporated into ordinary federal courts' constitutional interpretations.[81]

2. Potential Costs

There is one core potential cost of ICRA's regime of multiple authoritative interpreters and two ancillary costs.

a. *Protection*

The core potential cost is that permitting tribal courts to construe independently ICRA's provisions may subvert the very protections of Native Americans' civil rights that ICRA was intended to provide in the first place. I will label this the value of "Protection."

It is difficult as an *a priori* matter, however, to identify what substantive interpretations would undermine Protection. The most obvious candidate—that any variation from what is constitutionally required in general society violates Protection—does not survive scrutiny either doctrinally or normatively. Doctrinally, more than 20 years ago the Supreme Court expressly approved what many federal appellate courts long had held: that ICRA's provisions need not have the same substantive meanings as their sister terms in the Bill of Rights.[82] The logic behind this determination is that ICRA was intended to accomplish two goals that are in tension with one another: (1) protecting the rights of persons who enter Indian country by imposing limits on tribal governments, and (2) preserving "Indian self-government" and protecting the "tribe's ability to maintain itself as a culturally and politically distinct entity."[83] Over the past twenty years, Congress has considered amending ICRA many times to respond to the *Martinez* decision,[84] but at no point has it suggested that this aspect of the case should be overruled by statute. As a doctrinal matter, therefore, it is clear that under ICRA the value of Protection is not undermined simply by deviations from what the Bill of Rights requires.

As a normative matter, doctrinal variations are not necessarily violative of Protection, and they may even be necessary to best realize Protection. Foundational liberal commitments memorialized in the Constitution may demand the accommodation of select illiberal

81. *See* Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale L.J. 1225, 1238-85 (1999) (identifying these as benefits to be gained through the study of comparative constitutional law).

82. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978). For an example of a pre-*Martinez* appellate court decision that held the same, see *Tom v. Sutton*, 533 F.2d 1101, 1104 n.5 (9th Cir. 1976).

83. *Martinez*, 436 U.S. at 72.

84. *See infra* note 526 or 429 and accompanying text.

communities; not accommodating them may violate the communities' association interests as well as their members' liberty interests in being able to actualize themselves in accordance with their understanding of what self-actualization requires.[85] This is not to suggest that liberal commitments impose no limits on which communities should be accommodated and to what extent—but they impose fewer restrictions than is generally thought. In the end, identifying what variants from ordinary constitutional doctrines violate Protection requires recourse to a thick political theory.

Elsewhere I have explicated such a thick political theory that identifies which communities should be accommodated by our liberal constitutional order and to what extent,[86] and I will provide a brief overview of it below. In this Article, however, I will draw from this thick theory only occasionally and instead proceed primarily inductively. I do so for several reasons. First, as is the case with all thick theories, the particular theory I have propounded rests on nonaxiomatic and controversial grounds (for example, it deploys a Rawlsian framework that not everyone would accept). Because I believe that the empirical findings concerning ICRA are relevant even to those who do not accept my thick political theory, I prefer to present the findings in a manner that does not presume the reader's agreement with it.

Second, the inductive approach alone can, at the very least, defeat a potentially devastating threshold objection that can be leveled at ICRA's regime of multiple authoritative interpreters. Disposing of this criticism makes the task of finalizing a thick political theory all the more urgent. The threshold objection is that one does not need a thick political theory to know that Protection would be imperiled if the multiple interpreters did not take seriously their responsibilities by failing to engage in "good faith" interpretation. Indeed, one might be tempted to suggest that Protection is inherently undermined as a structural matter by the very institution of tribal courts because tribal courts are a part of the tribal government that Congress has attempted to constrain via ICRA to protect Indians and visitors to Indian country in the first place. Allowing the tribal courts to be the authoritative interpreters of the very statute that seeks to regulate the tribes could be viewed as tantamount to asking the fox to guard the henhouse, an inherent contradiction that is only deepened by the fact that there was firm tribal opposition to what the Indian community

85. For a full exposition of this, see Rosen, *Outer Limits*, *supra* note 7, at 1089-1106. In addition, the normative strength of Native Americans' claims to variations that facilitate the flourishing of their communities surely are strengthened by virtue of the history of their displacement by the early Americans.

86. For an effort to create such a theory, see *id.* at 1093-1106 (identifying limits on what perfectionist communities can do within their enclaves).

largely perceived to be ICRA's unjustified interference with tribal sovereignty.[87]

The power of such a structural critique, however, ultimately turns on empirics because it is possible that tribal judges take their institutional roles seriously. Determining whether tribal judges take their role seriously requires a systematic examination of the case law to determine if the tribal courts have undertaken the task of interpreting ICRA in good faith. Close examination of the ICRA case law provided in Part IV refutes the accusation that they have not; tribal courts, for the most part, have engaged in good faith interpretation and application of ICRA.

Though good faith interpretation is a necessary condition for Protection to be preserved, it is not a sufficient condition. Determining the outer limits of acceptable variations from ordinary constitutional doctrines ultimately requires a thick political theory. Elsewhere I have tried to answer the question of what variations from ordinary liberal practices are acceptable from a Rawlsian perspective.[88] What follows is a brief overview of that framework for determining what communities should be accommodated and to what extent.

Rawlsians seek to construct a just society by trying to imagine what political institutions people in an "original position" would choose. Under the original position, people are under a "veil of ignorance" and they do not know their religious, philosophical, or moral convictions. People in the original position accordingly would choose a basic political structure that would grant liberty to the broadest possible range of people to self-actualize in the manner that they deem necessary for their self-actualization. People in the original position would be exceedingly concerned about maximizing the range of individuals who could be accommodated because they would be fearful of creating a polity that might prevent them (whoever they might be) from self-actualizing. The people in the original position would seek to accommodate the interests of "political perfectionists" as well as ordinary liberals. Political perfectionists are those who believe that their self-actualization requires that they live in a small polity whose local governments are empowered to advance their community's understandings of the "good." People in the original position would want to accommodate such separatists because the persons they represent might be political perfectionists and they

87. *See* Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 Harv. J. on Legis. 557, 589-90 (1972).

88. *See* Rosen, *Outer Limits*, *supra* note 7, at 1064-71, 1089-1125. For an explanation as to why it might be important to ground a liberal approach in Rawls, see *id.* at 1061-63. For a similar deployment of Rawls, see Greene, *supra* note 8, at 8-14. For a libertarian approach to similar questions, see Nozick, *supra* note 8, at 297-334.

would not want to create a polity that would not allow themselves to self-actualize.[89]

But how could such separatists be accommodated? A federalist structure is the key: such communities could be allowed to largely govern themselves in select discrete geographical enclaves, subject to only two limited, but critical, constraints imposed by the central government. The first limitation is that the communities would not be permitted to disrupt the stability of the larger society—what might be called a requirement of "well-orderedness." The rationale behind such a limitation is that those in the original position seek to construct a stable larger polity and accordingly would not agree to a political structure that was inherently unstable. Well-orderedness requires that those in the perfectionist enclaves live peacefully with those outside their enclave, limits the externalities perfectionists can impose on their neighbors, and may even restrict the activities that can be undertaken within their enclave if the performance of certain acts that are too offensive to general society within the enclave may be destabilizing to the larger polity.[90]

The second requirement is that those within the perfectionist enclave be able to "exit" it. People in the original position would agree that an exit right is necessary because without it a polity would reproduce the problem that led them to accommodate political perfectionists in the first place; the polity would not maximally secure the liberty for its citizens to self-actualize because non-political perfectionists who find themselves within a perfectionist enclave would not be able to relocate and live in a non-perfectionist society, where they presumably believe self-actualization is most likely. The specific contours of the exit right are tricky to identify, however, because the exit right works against the needs of many political perfectionists to maintain the type of control over their citizens they find necessary. There is an inherent tension here, and the specific contours of the "exit right" can be fleshed out by asking what people in the original position would agree fair. As I have argued elsewhere, the exit right would require that children raised within the enclave be knowledgeable enough about the outside world to make an informed choice about remaining or exiting. The exit right would also demand that those raised within the enclave receive training that would permit them to make a living outside the enclave to ensure that exit is more

89. To be more precise, my analysis distinguishes between "universalist political perfectionists," who believe that the federal government must pursue the good, and "localist political perfectionists," who are ideologically committed only to living in a small polity that is empowered to actively advance their community's view of the good. Liberal thought requires the accommodation of localist political perfectionists but cannot accommodate universalist political perfectionists. *See* Rosen, *Outer Limits*, *supra* note 7, at 1069, 1095-96, 1111-12.

90. *See id.* at 1093-97.

than a mere theoretical option.[91] The exit right would not, however, preclude perfectionist communities from incarcerating people who have violated their penal laws if the community followed fair and consistent adjudicatory procedures.[92]

Apart from the limitations of well-orderedness and exit, a Rawlsian liberal's commitments lead to the conclusion that political perfectionists should be permitted to govern themselves as they see fit within their enclaves. Native Americans qualify as political perfectionists because they believe that they will be unable to sustain their distinctive cultures and communities unless they have the autonomy to govern themselves within their discrete enclaves.[93] These enclaves are known as Indian country. As a normative matter, the value of Protection is best preserved when political perfectionists like Native Americans are free to govern themselves, subject to the constraints imposed by well-orderedness and exit. ICRA is a limitation imposed by the central government that helps ensure that these limitations are respected.[94] Under this thick political theory, determining whether the power of tribal courts to interpret and apply ICRA undermines Protection turns on an analysis of whether well-orderedness and exit are respected or subverted under ICRA's regime of multiple authoritative interpreters.

b. *Ancillary Costs*

There are two potential costs of secondary importance caused by ICRA's regime of multiple authoritative interpreters. The first is that such a regime creates inefficiencies because it allows the same legal question to be constantly relitigated and permits the creation of nonuniform law. While it is undeniable that regimes of multiple authoritative interpreters incur some costs, it is not axiomatic that such costs would be inefficient. Variations in public goods across locales can lead to greater efficiencies in the allocation of public goods than having only one set because people can move to the locale that

91. *See id.* at 1097-1106.

92. *See id.* at 1100. Parallel doctrines in American law illustrate the correctness of this proposition. Although there is a constitutional right to travel, *see* Saenz v. Roe, 119 S. Ct. 1518, 1524-26 (1999), States obviously are permitted to incarcerate those who break their laws. Indeed, under certain circumstances States may even enhance criminal penalties for those who have committed a crime and then depart the State. *See* Jones v. Helms, 452 U.S. 412, 422-23 (1981).

93. *See* Rosen, *Outer Limits*, *supra* note 7, at 1134-35.

94. Elsewhere I have criticized ICRA as an unjustified federal intrusion on Indian political autonomy. *See* Rosen, *Nonformalistic Law*, *supra* note 39, at 629 & n.40; Rosen, *Outer Limits*, *supra* note 7, at 1136. It could be argued, however, that ICRA ensures that Native American constitutional sensibilities are sufficiently akin to general society's and, therefore, well-orderedness is secured. I am indebted to a conversation with Professor Ken Simons, which made this point clear to me.

provides the public goods they value.[95] Detailed doctrinal formulations of quasi-constitutional principles may well qualify as public goods whose variations from locale to locale might lead to net efficiency gains. In any event, even if there are efficiency costs to creating a regime of multiple authoritative interpreters, such costs would be relevant but not dispositive in assessing the normative desirability of creating such a regime insofar as financial costs are only one of many relevant considerations.

The second cost is externalities. Whether and to what extent externalities materialize, however, hinges on which provisions the multiple authoritative interpreters are entrusted with construing. It is conceivable that they could be given the power to construe only provisions that impose virtually no costs on those outside the enclave other than the knowledge that people within are behaving in accordance with different rules.

3. The Analytical Framework

The desirability of ICRA's regime of multiple authoritative interpreters turns on a balancing of its potential benefits against potential costs. I have divided the analytical framework for evaluating ICRA into two categories. The first set of four criteria assesses whether the ICRA regime of multiple authoritative interpreters has achieved the potential benefits. The second set of criteria measures whether ICRA has incurred any of the potential costs that attend regimes of multiple authoritative interpreters. The framework can be graphically summarized as follows:

Framework for Analyzing ICRA's Regimes of Multiple Authoritative Interpreters

Potential Benefits	Potential Costs
1. Institutional Diversity	1. Protection
2. Community-building	2. Inefficiencies
3. Self-Governance	3. Externalities
4. Legal Imagination	

95. For the classic statement of this point, see Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416, 418-20 (1956). Extensive literature has grown from Tiebout's article. *See, e.g.*, George Zodrow (ed.), Local Provision of Public Services: The Tiebout Model After Twenty-five Years (1983) (collecting articles analyzing the Tiebout model).

III. METHODOLOGICAL NOTES CONCERNING THE STUDY

This part provides background information essential to understanding the empirical review of the ICRA case law that is provided in Part IV. Subsection A explains important information about tribal courts. Subsections B and C discuss the data relied upon and the study's methodology.

A. *Tribal Courts*

Because tribal courts construe and apply the bulk of ICRA's provisions, understanding ICRA's implementation requires an understanding of the tribal courts themselves.

1. Structure of Tribal Courts

Adjudication in Indian country takes place in either tribal courts or Courts of Indian Offenses. Courts of Indian Offenses, frequently called "CFR Courts," are established and run by the Bureau of Indian Affairs. The reported case law demonstrates that virtually all ICRA adjudication occurs in tribal courts. Tribal courts are the adjudicatory bodies that are created either by tribal constitutions or the tribal legislative bodies. Most tribal constitutions do not directly create judiciaries or require a separation of powers, and therefore, virtually all tribal courts are the creation of tribal councils.[96]

Lacking constitutionally mandated structure and form, there is great diversity among the approximately five hundred and eleven tribal courts in the United States.[97] The Navajo Nation, for example, has seven district courts, a children's court, a peacemaker court within each district,[98] and an appellate court called the Navajo Nation Supreme Court. Some tribes, such as the Chickasaw Nation, the

96. *See* Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay*, 18 N.M. L. Rev. 49, 55-56 (1988). This is not to suggest that tribal courts are therefore an organic part of Indian culture. In fact, tribal constitutions were required by the Indian Reorganization Act of 1934, and virtually all tribal constitutions were drafted by the Bureau of Indian Affairs and utilized boilerplate language. *See* Felix S. Cohen, Handbook of Federal Indian Law 149-50 (1982). These historical facts make it possible to draw valid generalizations about Indian constitutions.

97. There are 511 courts as defined by the Indian Tribal Justice Act, which includes various courts of dispute resolution in Arkansas. There are approximately 350 tribal courts, excluding Arkansas natives. *See* E-mail from David Seldon, Law Librarian, National Indian Law Library/Native American Rights Fund, to Mark D. Rosen, Assistant Professor, Chicago-Kent College of Law (Aug. 31, 2000, 17:10:00 MST) (on file with the Fordham Law Review).

98. The peacemaker court "integrate[s] traditional Navajo dispute resolution methods with traditional Anglo-American judicial methods." Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 Ariz. L. Rev. 225, 227 n.3 (1989); *see also* Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 Am. Indian L. Rev. 89, 99-107 (1983) (discussing the peacemaker courts).

Choctaw Nation, the Pueblo of Sandia, and the Pueblo of Taos, do not have appellate courts. In some tribes, the tribal council—the body that enacts tribal legislation—functions as the appellate forum. In many of the pueblos in New Mexico, the tribal leader functions as tribal judge. Finally, many tribes belong to inter-tribal court and appellate systems. For example, the Intertribal Court of Appeals consists of the Crow Creek Sioux Tribe, the Sisseton-Wahpeton Sioux Tribe, the Rosebud Sioux Tribe, the Three Affiliated Tribes, and the Omaha Tribe.[99] The tribal courts also vary on account of the "sizes of the tribes, their reservations' general populations, their caseloads, their wealth and resources, their traditions, and the tribunals' longevity."[100]

2. The Role of the Tribal Judiciary: Doctrinal Considerations

Notwithstanding the differences among the tribal courts represented in the reported case law,[101] one important commonality is that they are institutions that independently review the limits on tribal government imposed by ICRA.[102] Indeed, assumption of this function is mandated by federal law. When the Supreme Court ruled in *Martinez* that federal courts were generally unable to hear ICRA claims, it also stated that tribes must provide forums "to vindicate rights created by ICRA."[103] Furthermore, although most tribal constitutions do not require a separation of powers between the legislative and judicial bodies, tribal courts have consistently held that

99. United States Commission on Civil Rights, The Indian Civil Rights Act 32-33 (1991) [hereinafter Commission Report].

100. *Id.* at 32. For example, whereas the Navajo Tribal Courts handled more than 40,000 cases in 1983, the Las Vegas Paiute Tribal Court heard only 14. *Id.*

101. For more on this, see *infra* Part III.B.

102. I have found only one reported case in which a tribal court has held that it lacks the power of judicial review. *See* Lane-Oreiro v. Lummi Indian Bus. Council, 21 Indian L. Rep. 6143 (Lummi Tribal Ct. 1994). The case grounds its decision in the tribal tradition of deference to elders who obtain their leadership position as tribal council members through a lifetime of wisdom and garnering respect.

103. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978). Most tribal courts accordingly have held that even though there is not a general separation of powers requirement, there is a specific requirement for there to be an independent tribal judicial forum to hear ICRA claims. *See, e.g.*, Good Iron v. Hall, 26 Indian L. Rep. 6029, 6030 (D. Ct. of Three Affiliated Tribes of the Fort Berthold Reservation 1998). Some tribal courts, however, have based their jurisdictional powers in respect of ICRA on a presumption of power in the absence of specific tribal ordinances to the contrary. *See, e.g.*, Stone v. Swan, 19 Indian L. Rep. 6093, 6094 (Colville Tribal Ct. 1992); Comm. for Better Tribal Gov't v. S. Ute Election Bd., 17 Indian L. Rep. 6095, 6096 (S. Ute Tribal Ct. 1990). But this reasoning overlooks the fact that the Supreme Court's holding in *Martinez* is the basis in federal law for tribal courts' powers of judicial review, and accordingly understates the legal justification for judicial review. To date, there have been no reported cases concerning a tribal council's effort to eliminate a tribal court's power of judicial review through legislation—a circumstance whose outcome would depend upon which legal theory for judicial review the tribal court adopted.

efforts by tribal council members to exert "undue influence" on the courts violate ICRA's due process guarantees.[104]

The doctrine of tribal sovereign immunity, however, is a potential doctrinal obstacle to the tribal courts' functioning as fora to vindicate ICRA rights. *Martinez* specifically held that ICRA did not waive tribal sovereign immunity.[105] Although this at first might seem to be at odds with *Martinez's* other holding that tribal courts must provide forums to vindicate ICRA rights, it is important to note that the most commonly asserted claims against Federal and State governments to vindicate civil rights claims—*Bivens* and § 1983 claims—are also not premised on waivers of sovereign immunity.[106] Prospective injunctive relief or damages against government officials who have acted beyond the scope of their duties is the typical remedy obtained in these cases.[107]

The same is true of Native American tribes. Many tribal courts have held that ICRA does not waive tribal sovereign immunity,[108] but have allowed prospective injunctive relief or damages where tribal officials act beyond the scope of their duties.[109] This structure of

104. *See, e.g.*, Cheyenne River Sioux Tribe v. Dupree Am. Legion Club, 19 Indian L. Rep. 6097, 6101 (Cheyenne River Sioux Ct. App. 1992) (noting that overreaching by tribal council that impedes judicial autonomy would "raise fundamental question of due process" in violation of ICRA). Though tribal councils for the most part appear to have respected the role of the tribal courts, I have found one case where the council sought to depose the chief tribal judge due, apparently, to disagreement with the judge's rulings. *See* McKinney v. Bus. Council of the Shoshone-Paiute Tribes, 20 Indian L. Rep. 6020 (Duck Valley Tribal Ct. 1993). The chief judge was subsequently reinstated by the tribal court. *Id.*

105. *Martinez*, 436 U.S. at 59 ("[T]he provisions of section 1303 can hardly be read as a general waiver of the tribe's sovereign immunity. In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit.").

106. *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 67 (1989) (holding that § 1983 did not override state sovereign immunity); McCollum v. Bolger, 794 F.2d 602, 608 (11th Cir. 1986) (stating that a *Bivens* action cannot be brought against the federal government because there is no waiver of sovereign immunity). The Supreme Court recently unanimously ruled that federal agencies are not subject to *Bivens* suits. *See* FDIC v. Meyer, 510 U.S. 471, 484-86 (1994). Section 1983 actions can be brought against municipalities, but only with regard to municipal policies or customs that are unconstitutional or illegal. *See* Monell v. Dep't. of Soc. Servs., 436 U.S. 658, 690-94 (1978).

107. *See, e.g.*, Bivens v. Six Unknown Named Agents, 403 U.S. 388, 397 (1971) (granting monetary relief against federal agents in their individual capacity).

108. *See e.g.*, TBI Contractors, Inc. v. Navajo Tribe, 16 Indian L. Rep. 6017, 6018-19 (Navajo 1988). On the other hand, many tribal courts have held otherwise and found that ICRA waived tribal immunity. *See e.g.*, LeCompte v. Jewett, 12 Indian L. Rep. 6025, 6026-27 (Cheyenne River Sioux Ct. App. 1985); Oglala Sioux Tribal Pers. Bd. v. Red Shirt, 16 Indian L. Rep. 6052-53 (Oglala Sioux Ct. App. 1983); Davis v. Keplin, 18 Indian L. Rep. 6148, 6149 (Turtle Mountain Tribal Ct. 1991).

109. *See, e.g.*, Comm. for Better Tribal Gov't v. S. Ute Election Bd., 17 Indian L. Rep. 6095, 6097 (S. Ute Tribal Ct. 1990) ("Although sovereign immunity bars Indian Civil Rights Act suits against tribes, this tribal immunity only 'extends to tribal officials acting in their representative capacity and within the scope of their

remedies need not interfere with the deployment of ICRA to protect rights in keeping with *Martinez*'s charge.[110] Limiting tribes' financial exposure is particularly important because most tribes have modest financial resources.[111]

B. *Data*

The study's greatest limitation is the incomplete body of reported case law from which it was able to draw. Most tribes do not publish their tribal court opinions, and the most comprehensive reporter of tribal court decisions, the Indian Law Reporter, typically publishes no more than one hundred decisions per year that come from about twenty-five tribes. Further, the Indian Law Reporter does not publish all the cases that are submitted to it by tribes. For these reasons, the reported case law is highly selective, rendering any effort to generalize about what is happening in Indian country impossible. The data does, however, help provide a concrete understanding of what is possible within the ICRA regime. To the extent that favorable patterns emerge from the limited data set available, it is advisable to institute information-gathering changes in the law (like funding and requiring the publication of tribal court decisions) to help illuminate what is really occurring in tribal courts, rather than respond to anecdotal evidence of tribal court abuses by radically restructuring tribal court jurisdiction.

C. *Methodology*

Eschewing reliance on indices, the study examined every published tribal court decision reported in the Indian Law Reporter over the thirteen year period from 1986 to 1998 (and five reported cases from 1999; the reporter service is backlogged). The study only considered those cases in which some substantive provision of ICRA, or analogous provisions in a tribal constitution, was construed. Thus, the study does not include the many opinions that deal exclusively with

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authority.'" (quoting Snow v. Quinalt Indian Nation, 709 F.2d 1319, 1321 (9th Cir. 1983))).

110. While the case law analyzed *infra* in Part IV shows that tribal sovereign immunity has not precluded meaningful utilization of ICRA to bring about changes in tribal government, the limited case law available for this study does not permit the broader conclusion that tribal sovereign immunity has not been problematic to realizing ICRA's goals. For a study concluding that tribal sovereign immunity sometimes has proven to be problematic, see Commission Report, *supra* note 99, at 72.

111. *See* Johnson v. Navajo Nation, 14 Indian L. Rep. 6037, 6040 (Navajo 1987) (holding that because sovereign immunity has such great "direct consequences on the Navajo tribal treasury," the principle that the Navajos "are entitled to a representative and accountable" tribal government demands that any decision concerning waiver of immunity be made by the "elected representatives of the Navajo people" (citations omitted)).

important legal issues such as sovereign immunity, the nature of the relief (injunctions as opposed to damages, for example), and the like. Also, the study does not give consideration to cases where ICRA is simply mentioned but not substantially analyzed.[112]

The study does not distinguish between cases interpreting ICRA provisions and tribal constitutional provisions. This merits some explanation. Nearly all tribes have tribal constitutions with provisions that track verbatim ICRA and the Bill of Rights. These tribal constitutional provisions are frequently relied on by litigants in tribal courts in conjunction with ICRA and, sometimes, are the only provisions invoked by litigants.[113] Although there are important technical differences between claims based on ICRA's due process provision and the Ho-Chunk Constitution,[114] these differences are not relevant for purposes of this Article's study of multiple authoritative interpreters. After all, what due process means under either ICRA or the Ho-Chunk Constitution is determined solely by the Ho-Chunk tribal courts, and neither is reviewable by a federal court. The tribal court's interpretation of "due process" under the tribal constitution, therefore, sheds as much light on the operation of a regime of multiple authoritative interpreters as does interpretation of ICRA's due process provision. Consequently, this Article will not differentiate between claims based on ICRA and the tribal constitutions.

In total, there were 194 reported cases, in which 249 claims were asserted. A list of all cases and claims is provided in Appendix A.

IV. EMPIRICAL STUDY OF INDIAN CIVIL RIGHTS ACT CASE LAW

At last, the empirical study. Subsection A examines the ICRA case law from the vantage point of determining whether ICRA has achieved the potential benefits associated with a regime of multiple authoritative interpreters. Subsection B analyzes the case law to assess what, if any, potential costs relating to such a regime have been incurred.

112. *See, e.g.*, Brehmer v. White Wolf, 23 Indian L. Rep. 6073, 6074 (Cheyenne River Sioux Ct. App. 1993) ("Such a summary procedure might raise some questions of due process under [ICRA]. Given its ruling that it lacks jurisdiction over this appeal under the tribal equivalent of 28 U.S.C. § 1292(a), however, the court need not resolve such due process questions.").

113. Although it is true that the federal law of ICRA is always applicable and accordingly would appear to provide a substantive floor below which Indian constitutional law cannot fall, in practice it is always possible for a litigant to waive his or her ICRA rights by failing to raise an ICRA claim.

114. For example, only claims based on ICRA's due process provision constitute a federal claim and only ICRA provides a basis for federal court jurisdiction under § 1303's habeas provision. *See supra* notes 23-25 and accompanying text.

A. *Testing the Framework's First Set of Criteria: Potential Benefits*

The framework's first set of criteria determines whether a regime of multiple authoritative interpreters achieves any or all of its potential benefits of extending possibilities for self-governance, expanding the range of legal and institutional options, enabling idiosyncratic but valuable communities to flourish, and firing the legal imagination. There is ample evidence that ICRA has achieved the first three potential benefits. There is no evidence that the fourth benefit has been realized, but this is not surprising in light of the widespread unawareness of ICRA among those not expert in federal Indian law. Hopefully, this Article may help to change this present reality.

1. The Overlap of Distinctive Doctrines, Community-Building and Self-Governance

The potential benefits of community-building, distinctive institutions, and self-government overlap in the context of ICRA. Indeed, in *Martinez*, the case that played a key role in creating the ICRA regime of multiple authoritative interpreters,[115] the Supreme Court explicitly linked all three potential benefits. The *Martinez* Court justified its holding on the ground that "the retained sovereignty of the tribes is that needed to . . . preserve their own unique customs and social order."[116] The Court concluded that ICRA was intended to enhance both "Indian self-government" and the "tribe's ability to maintain itself as a culturally and politically distinct entity."[117]

Upon examination of the interpretive canons used by the tribal courts as well as the courts' substantive holdings, it is evident that the ICRA regime of multiple authoritative interpreters has realized these benefits, as shown below in subsections two to five.

2. Tribal Interpretive Canons

Consistent with the license provided by the Supreme Court in the *Martinez* case,[118] the principal interpretive approach taken by virtually all[119] tribal courts in construing ICRA is that its provisions need not be interpreted in the same way as their sister terms in the Bill of Rights.

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115. This is true insofar as *Martinez* deprived federal courts of virtually all subject matter jurisdiction, leaving jurisdiction to tribal courts, and made clear that each tribe's tribal court could construe the ICRA provisions in light of its own values and needs. *See supra* notes 22-25, 31 and accompanying text.

116. Duro v. Reina, 495 U.S. 676, 685-86 (1990).

117. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62, 72 (1977).

118. *See supra* notes 22-28 and accompanying text.

119. One tribal court has concluded that ICRA's provisions should be given the same meanings as Bill of Rights provisions. *See* Walker River Paiute Tribe v. Jake, 23 Indian L. Rep. 6204, 6205-07 (Walker River Tribal Ct. 1996).

Instead, the provisions are to be construed in light of tribal traditions, values and needs. For example, in *Ponca Tribal Election Board v. Snake*,[120] the tribal court stated that:

> [w]hen analyzing due process claims, it is important to note that the Indian nations have formulated their own notions of due process and equal protection in compliance with both aboriginal and modern tribal law. Indian Tribes, whose legal traditions are rooted in more informal traditions and customs, are markedly different from English common law countries, upon which the United States' notions of due process are founded.[121]

Similarly, in *Plummer v. Plummer*,[122] the tribal court held that "due process protections are a product of moral principles, and our own morality and tribal customs frame such principles in the Navajo way." For these sorts of reasons, cautioned the *Snake*[123] court, "[w]hen entering the arena of due process in the context of an Indian tribe, courts should not simply rely on ideas of due process rooted in the Anglo-American system and then attempt to apply these concepts to tribal governments as if they were states or the Federal government."[124]

This does not mean, however, that the tribal courts are unwilling to consult federal case law. For example, the very next sentence in the *Snake* opinion states: "[t]hat is not to say that the general concepts of due process analysis with regard to state and federal governments are wholly inapplicable to Indian governments."[125] Tribal willingness to look seriously at federal case law is consistent with the methods of interpretation identified in the model of ICRA interpretation[126] as well as the significant degree of tribal assimilation of basic Anglo political values that is evident in the tribal case law, a finding examined below in depth.[127] Nonetheless, tribal courts recognize that federal "precedents are certainly not dispositive nor controlling in the tribal context. One should tread lightly when analyzing the scope and nature of tribal sovereignty and not make assumptions based upon a history and legal tradition that might be entirely foreign to an Indian nation."[128]

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120. 17 Indian L. Rep. 6085 (Ponca Ct. App. 1988).

121. *Id.*; *see also* Kinslow v. Bus. Comm. of the Citizen Band of Potawatomi, 15 Indian L. Rep. 6007 (Citizen Band Potawatomi Sup. Ct. 1988) (similar).

122. 17 Indian L. Rep. 6151, 6152 (Navajo 1990).

123. 17 Indian L. Rep. at 6088.

124. *Id.* Another court has put the matter succinctly: "[u]nder the Indian Civil Rights Act, parties . . . should be cautious in evaluating due process in Anglo terms." Colville Confederated Tribes v. Wiley, 23 Indian L. Rep. 6037, 6037 n.4 (Colville Tribal Ct. 1996).

125. *Snake*, 17 Indian L. Rep. at 6088.

126. *See supra* Part II.A.2.

127. *See infra* Part IV.B.3.

128. *Snake*, 17 Indian L. Rep. at 6088.

3. Identical Outcomes

It is worth noting from the start that the benefits of community-building and self-governance do not necessarily require that there be substantive outcomes in the tribal courts that differ from the likely outcomes in federal courts (though diversity of legal doctrines and institutions by definition does). This is most readily seen in respect to the value of self-governance, which simply requires that the tribe have the power to self-govern, but on its own says nothing about the substance of the governing policies. It is equally true, however, that community-building can be advanced by tribal court decisions that rely on tribe-specific values and approaches to achieve the same outcomes that federal courts would likely reach.

The case of *Atcitty v. District Court for the Judicial District of Window Rock*[129] is instructive in this regard. The issue in *Atcitty* was whether mere applicants for housing services on the Navajo Reservation had a sufficient property interest to assert due process claims that the housing services department's procedures were inadequate. The tribal court engaged in Tailoring.[130] The court adopted the federal Standard that a claimant must have a "legitimate claim, rather than a mere unilateral expectation, to the benefit," but instead of using the Legal Test developed by federal courts—which required an examination of the "statutes and policy guidelines to determine whether a claimant has the requisite legitimate claim to the benefit"—the tribal court defined "legitimate claim" by reference to the Navajo concept of *k'e*, which concerns "one's unique, reciprocal relationships to the community and the universe."[131] According to the court, *k'e* "frames the Navajo perception of moral right, and therefore this court's interpretation of due process rights."[132]

> [*K'e*] promotes respect, solidarity, compassion and cooperation so that people may live in *hozho*, or harmony. *K'e* stresses the duties and obligations of individuals relative to their community. The importance of *k'e* to maintaining social order cannot be overstated. In light of *k'e*, due process can be understood as a means to ensure that individuals who are living in a state of disorder or disharmony are brought back into the community *so that order for the entire community can be reestablished.*[133]

K'e required the court to examine the Navajo doctrine of "distributive justice":

> "[d]istributive justice is concerned with the well-being of everyone in a community. For instance, if I see a hungry person, it does not

129. 24 Indian L. Rep. 6013 (Navajo 1996).
130. *See id.*; Part II.A.2.
131. 24 Indian L. Rep. at 6014.
132. *Id.*
133. *Id.* (emphasis added) (footnote omitted).

> matter whether I am responsible for the hunger. If someone is injured, it is irrelevant that I did not hurt that person. I have a responsibility, as a Navajo, to treat everyone as if he or she were my relative and therefore to help that hungry person. I am responsible for all my relatives. This value which translates itself into law under the Navajo system of justice is that everyone is part of a community, and the resources of the community must be shared with all." Distributive justice requires sharing of Navajo Nation resources among eligible applicants.[134]

Applying these principles to due process, the court then ruled that "[i]f the respondents are eligible for receiving governmental benefits, and although they are mere applicants, they have a sufficient property interest under Navajo common law to assert due process claims."[135]

Even though the same outcome probably would have been obtained in a federal court utilizing ordinary federal doctrine,[136] it is important *vis-a-vis* not only self-governance but also community-building that the tribal court had the opportunity to arrive at its legal conclusion by reference to its tribe's particular cultural values. Although not all communities require the type of political autonomy afforded by regimes of multiple authoritative interpreters in order to flourish,[137] the power to create law that multiple authoritative interpreters provides—that is, the power to articulate both the holding and the narrative within which the legal outcome is situated—is important for some communities.[138] Where the multiple authoritative interpreter arrives at an outcome indistinguishable from the outcome that would have been obtained in ordinary courts, the community-building function multiple authoritative interpreters serves is to afford the community the opportunity to treat the community narratives that reflect their self-understandings (such as *k'e* and Navajo distributive justice) as law rather than mere literature. This allows the communities to gain the socializing and other benefits the law affords.[139]

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134. *Id.* (quoting The Honorable Robert Yazzie, *Life Comes From It: Navajo Justice Concepts*, 24 N.M. L. Rev. 175, 185 (1994)).

135. *Id.*

136. *See* Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) (noting that "welfare recipients in *Goldberg v. Kelly* had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so").

137. For a discussion of what types of communities might need such powers, see Rosen, *Outer Limits*, *supra* note 7, at 1064-86.

138. *See* Cover, *supra* note 8, at 40-44 (discussing "jurispathic" power of general society's law to destroy some communities).

139. *See* Rosen, *Outer Limits*, *supra* note 7, at 1064-86 (discussing significant socializing effect of law).

4. Variant Outcomes

Frequently, however, community-building is viewed as requiring outcomes that vary from the outcomes that would have been obtained in ordinary federal courts under ordinary federal doctrines. Here are some examples.

a. *Due Process and Respect for Tribal Leadership*

In *Colville Confederated Tribes v. Bray*,[140] the issue was whether due process requires that a judge, rather than the prosecutor, make the probable cause determination following a nonwarrant arrest. Supreme Court case law requires that such determinations be made by a judge.[141] Deploying the interpretive approach of Tailoring, the tribal court ruled that the prosecutor could also make that determination in the tribal context.[142] The *Bray* court came to its conclusion based on the traditional Indian value of trust in leadership. The court noted that "[L]eaders . . . were chosen because of the respect others had for their decision-making ability in a particular area . . . . Traditionally, when a tribal leader made a decision, it was followed because of the respect and trust the tribal community had for him."[143] The *Bray* court concluded that the trust deemed integral to tribal government would be undermined by the type of checks and balances that Anglo due process required.[144] This is not to say that the tribe ceded its autonomy to despots and gave up its powers of self-government; trust was consistent with self-rule because "when the community no longer trusted the decision-making ability of the leader, they just stopped following him."[145] The *Bray* court held that these traditional principles carried over to the instant context:

> [i]t is incumbent upon the tribal judges and justices to sustain the attitude of trust and respect in their leadership role in the Indian community in order to maintain the community's confidence in the court system . . . . [The tribe must trust] that the prosecutor will, in fact, truly and faithfully carry out his duties.[146]

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140. 26 Indian L. Rep. 6061 (Colville Tribal Ct. 1999).

141. *See* Gerstein v. Pugh, 420 U.S. 103, 112-13 (1975).

142. For a court that has held otherwise, see *Walker River Paiute Tribe v. Jake*, 23 Indian L. Rep. 6204, 6206 (Walker River Tribal Ct. 1996) (noting that the probable cause determination following a warrantless arrest must be "made by a neutral tribal court judge").

143. *Bray*, 26 Indian L. Rep. at 6062 (citations omitted).

144. *See id.*

145. *Id.*

146. *Id.* at 6062-63 (citations omitted). The *Bray* court recognized that today leaders are chosen differently and that the existence of written laws both removes discretion and impedes the community from deciding when it will stop following a given leader. *Id.* The court nevertheless held that there remained avenues for tribal members to express distrust of prosecutors and that the better approach was to allow

b. *Search and Seizure and Checking After Members' Welfare*

A man named Kahe had not been seen by his Hopi neighbors for more than a day. Concerned about Kahe's well-being, a neighbor asked the police to look for him. Pursuant to this request, tribal police stopped Kahe's vehicle for what was known on the Hopi reservation as a "welfare check." Though the stop had not been prompted by concerns of criminal conduct, the police requested to see Kahe's license and search his car. The tribal police found alcohol, which was illegal, upon searching the vehicle.

In *Hopi Tribe v. Kahe*,[147] the issue was whether the search and seizure violated ICRA's prohibition against unreasonable searches and seizures. The court employed Fitted Incorporation, adopting the federal doctrinal rubric of "probable cause" to determine if the stop and search was lawful but determining the content of "probable cause" by reference to considerations unique to the Hopi tribe.[148] The court determined that the welfare check was lawful, but that the requests to see the driver's license and search the car were not.[149] Whether there was probable cause had to be determined by taking "into consideration customary and traditional ways of the Hopi people. Because of the extended family system, Hopi people look out for and take care of each other. It is Hopi to be concerned about the welfare of your family and neighbors and to make sure that they are okay."[150]

The *Kahe* court concluded that the tribal police had probable cause to stop the vehicle, because "when someone makes a request of the police to check on the well-being of a person it is expected that police officers have the responsibility and obligation to make the welfare check."[151] But concern for not construing the law of search and seizure in a manner that would undermine Hopi values led to the court's second holding: that the tribal police's request to see the defendant's license and search his car was unreasonable.[152] The *Kahe* court stated that "this court wants to encourage the principle behind welfare stops, it does not want to discourage calls from concerned family members with the threat that those individuals will immediately be subject to arrest."[153]

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in the first instance for a government structure that called upon and cultivated the tribe's trust in its leaders. *Id.*

147. 21 Indian L. Rep. 6079 (Hopi Tribal Ct. 1994).
148. *See id.* at 6079.
149. *See id.* at 6080.
150. *Id.* at 6079.
151. *Id.*
152. *See id.* at 6080.
153. *Id.* at 6079.

c. *Void for Vagueness, Honesty, and the Integration of Wrongdoers Back Into the Community*

A man named Stepetin had driven his truck at high speed on a gravel road in close proximity to people, injuring no one but killing a dog.[154] A tribal ordinance provided that "[w]here state law . . . does not conflict with the Tribal Code, the Tribal Court may resort to and enforce any state statute within tribal jurisdiction."[155] No provisions of the tribal code directly governed Stepetin's actions, but a provision of State law criminalized them.[156] Stepetin was prosecuted under the tribal ordinance insofar as it incorporated State law.[157]

The question before the tribal court in *Stepetin v. Nisqually Indian Community*[158] was whether the tribal ordinance violated ICRA's due process guarantees because it was void for vagueness. A majority of the tribal court answered in the affirmative. Deploying Stock Incorporation, the tribal court held that "[t]he principle underlying the vagueness doctrine is that no one is to be held criminally responsible for conduct which he or she could not reasonably understand to be proscribed."[159] Even though "[a]ny reasonable person should know this type of conduct is prohibited in any community . . . the issue [is] not whether [defendant] knew this conduct was wrong, but whether he knew it was a crime."[160] The incorporation provision did not meet this test.[161]

The partial dissent in *Stepetin* highlights the connection between variations from ordinary doctrines and community well-being. The partial dissent criticized the majority for "ignoring the internal dynamics of the tribal community."[162] In response to the majority's importation of the ordinary federal Legal Test that the analysis turned not on the defendant's knowledge of wrongdoing but on whether he knew it was a crime, the dissent Re-Standardized. The partial dissent criticized the majority's conclusion that criminal prohibitions had to appear in written statutes, noting that "traditionally, for a member of what is now the Nisqually Indian Community, there was no difference between wrongful conduct and that which was societally sanctioned" and that it did not matter whether the source of the tribal member's knowledge was a written prohibition or an oral tradition.[163] The

154. *See* Stepetin v. Nisqually Indian Cmty., 20 Indian L. Rep. 6049 (Nisqually Ct. App. 1993).
155. *Id.* at 6050 (citation omitted).
156. *See id.* at 6050-51.
157. *See id.*
158. *Id.*
159. *Id.* at 6051.
160. *Id.*
161. *See id.* at 6051.
162. *Id.* at 6052 (Irvin, C.J., concurring in part and dissenting in part).
163. *Id.* at 6053.

partial dissent concluded that the rule for ICRA due process purposes should follow the traditional Nisqually approach because ICRA is to be construed "in the context of tribal traditions" and in view of the "cultural expectations and the dynamics of the tribal community."[164] Applying the Re-standardized rule in the context at hand, the partial dissent concluded that the defendant had the requisite actual knowledge that his behavior was wrong.[165]

Of particular significance for present purposes is the partial dissent's argument that the majority's approach harmed the community's well-being. The majority's rule rewarded a defendant's factually false claim that he lacked notice, thereby interfering with the "high value on telling the truth, and on the admission of fault by a wrongdoer" valued by the tribal community.[166] Moreover, the majority's rule hindered the "correction of the wrongful conduct and/or recompense for its consequences" that is "necessary in order for the wrongdoer to be taken back into the fold of the tribal community. To allow an offender to go unpunished for obvious wrongdoing is destructive to the social health of the tribal community."[167]

d. *Novel Doctrines and the Value of Self-Governance*

Several tribal courts have created novel legal doctrines designed to advance the tribal value of self-governance. Utilizing the jury right, the case of *Downey v. Bigman*[168] developed limitations on the powers

164. *Id.* (internal quotation omitted).

165. The partial dissent stated that Stepetin "knew that the type of behavior he engaged in could result in tribally imposed sanctions" by virtue of his having lived in the "close-knit society" of the Nisqually Indian Community all his life. *Id.* His "knowledge of those common social duties imposed by traditional tribal mores constituted adequate notice that his conduct could [trigger] tribal sanctions." *Id.* Furthermore, continued the partial dissent, the defendant "also had actual notice that the reckless driving statute and other state motor vehicle offenses were being enforced on the Nisqually Reservation, and that his conduct could or would be criminally punished .... [W]ord travels very fast [on the reservation].... To discount its existence and effectiveness in providing notice ... would be to deny reality." *Id.* at 6053-54.

166. *Id.* at 6055.

167. *Id.* For the purpose of illustrating the connection between nonuniformity and community-building, it does not matter that the dissent's view did not sway the majority. It is interesting, however, to contemplate why the majority ruled as it did. The majority appears to agree with the dissent's description of the "realities" of tribal life. *See id.* at 6051 ("We are aware that on the Nisqually Reservation word may travel quickly throughout the reservation."). The majority, however, does not explain why it believes the dissent's reliance on the Nisqually cultural context is mistaken. *See id.* The majority simply asserts that the enactment of written ordinances constitutes the quasi-constitutionally "proper" modality for disseminating information about criminally proscribed activity. *Id.* The majority's adoption of written requirements perhaps can best be explained as an instance of the assimilation of Anglo values. For more on this point, see *infra* Part IV.B.3.

168. 22 Indian L. Rep. 6145 (Navajo 1995).

of tribal judges to disregard jury findings. The court grounded its doctrinal holdings in tribal customs that reflected concerns not only for the rights of the defendant but also the community's interest in participating in government. Consulting tribal tradition, the court first noted that juries are a "modern expression of our longstanding legacy of participatory democracy," that is "the ability of the people as a whole to make law":

> Navajo participatory democracy guarantees participants their fundamental right to speak on an issue, and discussion continues until the participants reach consensus. In this sense, decisions are a product of agreement among the community rather than a select few. Status, wealth and age are not determinants of whether a person may participate in the decision-making process. Furthermore, no one is pressured to agree to a certain solution, and persuasion, not coercion, is the vehicle for prompting decisions.[169]

The court also stated that juries are a continuation of the tradition of "community participation in the resolution of disputes through deliberation and consensus."[170] A juror participates in community self-governance by interpreting and executing community laws.

These tradition-based principles led the *Bigman* court to adopt strict limits on a trial court's ability to overturn a jury verdict.[171] They also resulted in the court's creation of a novel jury procedure under which jurors may "ask questions of the witnesses during trial" so that the jury would be "more reflective of Navajo participatory democracy."[172] In basing its holding on the proposition that the jury right encompassed both individual rights and community values of political participation, the tribal court engaged in Re-Targeting insofar as the Goal behind the jury right in American constitutional law is to protect the defendant and the integrity of the judiciary, not to provide a forum for self-government.[173]

Similarly, in *Rough Rock Community School v. Navajo Nation*,[174] the tribal court relied on both Tailoring and Re-Standardizing to advance values of self-governance. In *Rough Rock*, an ordinance that

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169. *Id.* at 6146.

170. *Id.*

171. *Id.* at 6146-47 (stating that the judge cannot become a thirteenth juror; overturning a "decision made by consensus" is "an authoritarian practice" that is permissible only when "the evidence is insufficient, as a matter of law, to support the finding . . . or when the jury is confused").

172. *Id.* at 6146. The court also decided that "[t]o maintain impartiality, all the questions will be channeled through the judge, whose authority to permit or forbid the question is discretionary." *Id.*

173. *See supra* notes 71-76 and accompanying text. Interestingly, Professor Akhil Amar has argued that the federal jury right was originally intended to play a similar role. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1187-89 (1991) (speaking of jurors' roles as "political participants" in the minds of the founders).

174. 22 Indian L. Rep. 6162 (Navajo 1995).

limited the field of candidates for the position of school board representative to persons who had a "demonstrated interest, experience and ability in Educational Management" was invalidated on due process grounds.[175] The tribal court first held that there exists a Navajo "higher law," akin to "'the Anglo concept of natural law,'" that can be found in "Navajo customs and traditions that are fundamental and basic to Navajo life and society."[176] Navajo higher law guarantees Navajos the "political liberty" to participate in government, and in the Tailoring section of its opinion the court held that this political liberty is protected under the ICRA due process clause.[177] To decide whether the candidacy prerequisites violated due process, the court Re-Standardized. Looking once again to tribal traditions, the court determined that laws that affect liberties derived from "higher law" must have "ascertainable standards" or they violate due process.[178] This new Standard reflected fundamental Navajo values: the absence of "objective" standards "delegate[s] unregulated discretion which could lead to manipulation and abuses of authority. Navajo thought deplores abuses of authority because of the consensual and egalitarian principles of governance."[179] The ordinance did not satisfy these requirements and, therefore, was struck down by the court.

e. *Variations Across Tribes*

Finally, it is worthwhile to reiterate that tribal courts create nonuniformities *vis-a-vis* not only United States constitutional law but also other tribes. Thus, although tribes sometimes cite to the opinions of other tribal courts,[180] most often they cite only to case law from their own tribe's courts. When citing to other tribes' courts, moreover, they have noted that the decisions of other tribes' courts are not binding on them.[181] Tribal courts have recognized that they

175. *Id.* at 6163 (citations omitted) (emphasis omitted).

176. *Id.* at 6164 (quoting Bennett v. Navajo Bd. of Election Supervisors, 18 Indian L. Rep. 6009 (Navajo 1990)).

177. *See id.*

178. *Id.* at 6165. This is a wholly new substantive rule. Under federal law, the doctrine most similar to it, void-for-vagueness, voids civil statutes only if a statute is "so vague and indefinite as really to be no rule or standard at all." Boutilier v. INS, 387 U.S. 118, 123 (1967) (quoting Small Co. v. Am. Sugar Ref. Co., 267 U.S. 233, 239 (1925)). Legislation affecting "fundamental rights" under substantive due process—the other analogous doctrine—are reviewed under strict scrutiny, *see, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 847-48 (1992), a Legal Test that also is different from the requirement of "objective" and "ascertainable standards."

179. *Rough Rock*, 22 Indian L. Rep. at 6165.

180. *See, e.g.*, Office of Navajo Labor Relations v. W. World, 21 Indian L. Rep. 6070 (Navajo 1994) (citing to many other tribes' opinions); Kinslow v. Bus. Comm. of the Citizen Bank Potawatomi Indian Tribe, 15 Indian L. Rep. 6007, 6009 (Citizen Band Potawatomi Sup. Ct. 1988) (citing to Navajo opinions).

181. *See, e.g.*, Rave v. Reynolds, 22 Indian L. Rep. 6137, 6139 (Winnebago Tribal

must take into account the "custom, tradition and history" of their own tribes in construing the ICRA provisions.[182] Another factor justifying different constructions is the unique "composition and territory" of the tribe.[183] As one court has noted,

> [i]n many cases, large tribes with large reservations have adopted the Federal Rules of Procedure and/or have incorporated state substantive laws into their codes. Case law from these tribal courts does not necessarily fit smaller reservations with strongly integrated communities, tribes with a different economic base and practices, or tribes with more relaxed procedures or simplified law and order codes.[184]

In short, Native American communities have utilized their respective regimes of multiple authoritative interpreters to develop legal applications that reflect and advance their communities' distinctive values. A more extensive overview of tribal case law under ICRA, which documents many more examples of this, is discussed below.[185]

B. *Testing the Framework's Second Set of Criteria: Potential Costs*

The framework's second set of criteria seeks to evaluate whether ICRA has incurred any or all potential costs such as undermining essential protections, or creating externalities or inefficiencies. The empirical study of the ICRA case law provides strong preliminary evidence that the costs of the ICRA regime of multiple authoritative interpreters have been minimal. With respect to the potential cost of Protection, the study strongly suggests that the two possible threshold critiques of a regime of multiple authoritative interpreters in ICRA—the absence of good faith interpretation and an inherent structural incapacity of the fox to guard the henhouse—are without merit. Tribal courts have developed substantive ICRA doctrines with real bite and in the process have effectuated significant changes in tribal government practices. Additional evidence demonstrates that tribal courts take their task of construing ICRA seriously. This evidence is the attentiveness tribal courts give to federal court precedents when construing ICRA's sister terms in the Bill of Rights, as well as the tendency of tribal courts to depart from federal interpretations only after articulating good reasons to do so. Indeed, analysis of the case law reveals that tribal courts have assimilated many Anglo constitutional values even though they have given the provisions varying applications. Additional evidence is that tribal courts appear

Ct. 1995) (noting that other tribes' holdings are "not binding on this court").

182. *Id.*

183. Stepetin v. Nisqually Indian Cmty., 20 Indian L. Rep. 6049, 6053 (Nisqually Ct. App. 1993) (Irvin, C.J., concurring in part and dissenting in part).

184. *Id.*

185. *See infra* Part IV.B.4.

to have dealt fairly with non-Indians and non-members who have raised ICRA claims.[186] As discussed above, however, a full evaluation of Protection requires not only an empirical study but also a normative theory to identify the range of doctrinal variations that is consistent with the value of Protection. None of the cases' holdings runs afoul of the protections that a Rawlsian framework would deem to be essential, though the reasoning of one case is problematic. Taken as a whole, the case law suggests that the costs to Protection, if indeed there have been any, have been minimal.

With respect to ancillary potential costs, the tribal court case law shows that it is possible to design a regime of multiple authoritative interpreters that produces few externalities. Limits on tribal court jurisdiction over outsiders has meant that virtually all ICRA jurisprudence concerns internal tribal matters whose effects outside Indian country are only slight. Because the study considers reported case law and not the costs of administering tribal courts, however, the study does not shed any light on the efficiency costs incurred by tribal courts.

1. The Deployment of ICRA to Protect Rights and Shape Tribal Government Practices

The costs of Protection would be prohibitively high if tribal courts did not take their charge of interpreting ICRA seriously and instead rendered the law's protections toothless. This has not happened. As subsections two to four will demonstrate, tribal courts have created doctrines that impose significant limitations on tribal governments. For example, over the past thirteen years tribal courts have relied on ICRA to close a tribal jail;[187] enjoin tribal elections pending the implementation of changes in voter qualifications;[188] strike down ordinances that prescribed qualifications for public office;[189] reverse the removal of tribal council members;[190] reverse tribal banishment decrees;[191] impose obligations on tribal governments to provide

186. There is, however, an insufficient quantity of case law to be certain about this point. *See infra* Part IV.B.4.h.

187. *See* McDonald v. Colville Confederated Tribes, 17 Indian L. Rep. 6030, 6030 (Colville Tribal Ct. 1990) (ordering closure of tribal jail facility "on the grounds that the jail has an inadequate ventilation system, a faulty and outdated electrical system[,] . . . and . . . that the conditions of the jail present a danger to the health and safety of the inmates").

188. *See* Kavena v. Hamilton, 16 Indian L. Rep. 6061 (Hopi Tribal Ct. 1988), *aff'd*, 16 Indian L. Rep. 6063 (Hopi App. Ct. 1989).

189. *See* Bennett v. Navajo Bd. of Election Supervisors, 18 Indian L. Rep. 6009 (Navajo 1990).

190. *See* Coalition for Fair Gov't II v. Lowe, 23 Indian L. Rep. 6181 (Ho-Chunk Tribal Ct. 1996).

191. *See* Burns Paiute Indian Tribe v. Dick, 22 Indian L. Rep. 6016, 6017 (Burns Paiute Ct. App. 1994).

information to tribal members;[192] require that terminated employees be provided representation at termination hearings;[193] dismiss criminal cases for the failure to prosecute in a timely fashion;[194] exclude from introduction into evidence information obtained pursuant to unlawful searches and seizures;[195] strike down or enjoin enforcement of ordinances for violating equal protection,[196] due process,[197] and the right to free exercise of religion;[198] and reverse countless determinations by tribal administrative bodies for due process violations.[199]

2. The Respect Accorded to Federal Precedent by Tribal Courts

A prerequisite to acceptable costs *vis-a-vis* Protection is that the multiple authoritative interpreters engage in good faith efforts of interpretation. A strong indicator that tribal courts take their responsibilities of construing ICRA seriously is the deference tribal courts give to federal case law construing the Bill of Rights. Although federal case law is not binding,[200] it is cited in nearly every tribal court opinion and plays an important role in tribal court construction of ICRA. In the sample of tribal court opinions examined by the study, tribal courts only occasionally engage in Tabula Rasa or Re-Targeting and almost always deploy some form of Adapted Adoption; tribal courts most frequently employ Tailoring and Fitted Incorporation, commonly Re-standardize, and occasionally engage in Stock

192. *See* Hopi Tribe v. Consol. Cases of Emerson AMI, 25 Indian L. Rep. 6163 (Hopi App. Ct. 1996) (holding that before defendants waive right to counsel court must tell them that lawyers understand law and procedure better than lay people, that they will be at a disadvantage without counsel, disclose the maximum consequences of the plea, and inform defendants of the availability of public defender); Hopi Tribe v. Consol. Cases of Donald Mahkewa, 25 Indian L. Rep. 6144 (Hopi App. Ct. 1995) (holding that due process requires that defendants arrested for driving under the influence be informed of right to arrange to have an independent blood alcohol test); *In re* Matter of Consol. Small Claims Cases, 24 Indian L. Rep. 6109 (Cheyenne River Sioux Tribal Ct. 1996) (holding that due process requires court to give notice to persons that they are entitled to a hearing of indigence after which, if they demonstrate poverty, they will be freed after being jailed for contempt of court).

193. *See* Johnson v. Mashantucket Pequot Gaming Enter., 25 Indian L. Rep. 6011 (Mashantucket Pequot Ct. App. 1996).

194. *See* Suquamish Indian Tribe v. Purser, 21 Indian L. Rep. 6090 (Suquamish Ct. App. 1992).

195. *In re* D.N., 22 Indian L. Rep. 6071 (Hopi Child. Ct. 1995).

196. *See* Conroy v. Bear Runner, 16 Indian L. Rep. 6037, 6039 (Oglala Ct. App. 1984).

197. *See* Rough Rock Cmty. Sch. v. Navajo Nation, 22 Indian L. Rep. 6162 (Navajo 1995).

198. *See* Kavena v. Hamilton, 16 Indian L. Rep. 6061, 6062 (Hopi Tribal Ct. 1988).

199. *See e.g.*, One Feather v. Oglala Sioux Tribal Pub. Safety Comm'n, 16 Indian L. Rep. 6042 (Oglala Ct. App. 1986).

200. *See id.*; *see also* Hoopa Valley Indian Hous. Auth. v. Gerstner, 22 Indian L. Rep. 6002, 6005 (Hoopa Ct. App. 1993) ("Even though the decisions of federal . . . courts are not controlling in this court, such decisions can be used as guidance . . . .").

Incorporation. This is not to suggest that Tabula Rasa is illicit; tribal courts have full authority to interpret in this manner, and even exclusive reliance on Tabula Rasa would not be *per se* problematic. Nonetheless, the distribution of interpretive approaches found in ICRA case law is illuminating in respect to "good faith" because it demonstrates that tribal courts are not averse to consciously adopting Anglo law that they believe to be consistent with their tribe's values.[201] This is a strong indicator that the tribal courts do not interpret ICRA irresponsibly. One might conclude that tribal court reliance on federal case law reflects either a lack of legal imagination by the tribal court or the fact that the tribal court regime of multiple authoritative interpreters is a waste of resources. The significant tribal court deviations from ordinary federal doctrines documented in this Article, however, belies such inferences. Though tribal courts look to federal case law for guidance,[202] they do not merely parrot federal approaches.

3. Assimilation and Syncretism

The reported ICRA decisions indicate that tribal courts have deeply assimilated the Anglo jurisprudential concepts that appear in ICRA's substantive provisions even though they have given them applications that reflect tribal values. In the words of one tribal court, "[a]lthough tribal due process may differ when it comes to its application to customary and traditional laws, many of the principles embodied in the Bill of Rights have become key ingredients in the Indian legal processes."[203] The result is a syncretism of Anglo and tribal values and, in the process, a deep assimilation of many Anglo constitutional values by the tribal courts.[204] This constitutes further evidence that tribal courts have engaged in good faith efforts to interpret ICRA seriously, for such assimilation otherwise would not be expected to have occurred.

It is important to note that assimilation of Anglo concepts occurs not only when a holding wholly adopts federal law, but also when

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201. Relatedly, when tribal courts decide that tribal customs, values or needs require either modification of the federal rule or adoption of an entirely different rulification, they frequently explain why deviation from the federal approach is necessary. *See, e.g.,* Suquamish Indian Tribe v. Purser, 21 Indian L. Rep. 6090, 6091 (Suquamish Ct. App. 1992); *supra* Part IV.

202. *Cf.* Tushnet, *supra* note 81, at 1238-69 (discussing "functionalist" benefits of comparative constitutional law).

203. Teeman v. Burns Paiute Indian Tribe, 25 Indian L. Rep. 6197, 6199 (Burns Paiute Ct. App. 1997).

204. The case law alone does not reveal to what extent Indians who play no role in the legal system have assimilated the Anglo values insofar as the role law plays in "constituting" a culture varies depending upon culturally specific factors. *See* Tushnet, *supra* note 81, at 1269-85.

tribal courts advance unique constructions of the ICRA provisions.[205] Consider the important role that Anglo jurisprudential concepts play when tribal courts make good faith efforts to define ICRA provisions by reference to tribal customs. The tribal custom must be fitted within an Anglo term, and this leads tribal courts to assimilate Anglo judicial concepts into their lexicons and ways of thinking.[206] This may well lead tribal courts to adopt the larger gestalt of the system of which the Anglo term is a part. For example, due process is part of a jurisprudential system that emphasizes the rights of individuals rather than the duties of individuals or the rights of the government.[207] The effort to interpret the Anglo term by reference to tribal customs, therefore, may affect tribal courts' understandings of their own tribal customs, a particularly deep form of assimilation and cultural syncretism.

These phenomena are well illustrated in *Begay v. Navajo Nation*.[208] In *Begay*, the tribal court tried to derive due process' requirements by reference to tribal customs.[209] The tribal court held that "[t]he concept of due process was not brought to the Navajo Nation by the Indian Civil Rights Act .... The Navajo people have an established custom of notifying all involved parties in a controversy and allowing them ... an opportunity to present and defend their positions."[210] To support this, the Court pointed to the tribe's customary approach to dispute resolution:

> [w]hen conflicts arise, involved parties will go to an elder statesman, a medicine man, or a well-respected member of the community for advice on the problem and to ask that person to speak with the one they see as the cause of the conflict. The advisor will warn the accused of the action being contemplated and give notice of the upcoming group gathering. At the gathering, all parties directly or indirectly involved will be allowed to speak, after which a collective decision will be made.[211]

From this narrative of customary practices, the tribal court derived

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205. This is true only if there is a good faith effort to construe the ICRA provision.

206. *See, e.g.*, Navajo Nation v. Platero, 19 Indian L. Rep. 6049, 6050 (Navajo 1991) (tribal court uses Anglo terms of "due process," "fundamental fairness," and "common law" to describe traditional and distinctive Navajo law: "Navajo due process, which is fundamental fairness in a Navajo cultural context" can be found in "Navajo common law").

207. *Cf.* Helgeson v. Lac Du Flambeau Band of Lake Superior Chippewa Indians, 25 Indian L. Rep. 6045, 6053 (Lac Du Flambeau App. Ct. 1998) ("Prior to European influence, it was a well accepted belief throughout Indian Country that individual rights lie subordinate to the rights of the tribe .... The notion of individual rights was foreign to Indian people and the imposition of the Indian Civil Rights Act is looked upon as an infringement on the rights of Indians to govern themselves.").

208. 15 Indian L. Rep. 6032 (Navajo 1988).

209. *Id.* at 6034-35.

210. *Id.* at 6034.

211. *Id.*

the content of what the court dubbed "Navajo customary due process": "[t]he heart of Navajo due process, thus, is notice and an opportunity to present and defend a position."[212] The degree of deep assimilation evidenced in *Begay* extends far beyond attaching an Anglo label to customary tribal practices to the court's understanding of the practices themselves. The narrative was intended to identify the content of due process. But rather than yielding what the court found—that due process requires notice and a hearing—the narrative revealed that there were *several* components of customary dispute resolution: parties (1) *voluntarily* went to a (2) *respected elder* who gave (3) *notice* to the party believed to have done wrong of an (4) *upcoming group gathering* at which (5) *all parties directly or indirectly involved* were allowed to (6) *speak*, after which a (7) *collective decision* was made. The *Begay* court concluded that only two of these components—"notice and an opportunity to present and defend a position"—constituted the "heart of Navajo due process."[213] But why? The court could have concluded that due process requires that the aggrieved party choose an elder statesman to act as arbiter, be part of a group gathering, and then obtain a collective decision. A plausible explanation is that the Navajo Supreme Court's understanding of its tribe's customary practices was influenced by the court's understanding of what Anglo due process requires.[214]

Another gauge of deep tribal court assimilation of Anglo jurisprudence is the evidence of tribal courts' progressive fluency with the ICRA provisions. A large number of tribal cases employ terms such as "due process," "fundamental rights," "equal protection," "warrant," "probable cause," and so forth, without citing to any statutory or tribal constitutional sources.[215] Similarly, many recent tribal court decisions that cite to an ICRA provision will then articulate the provision's Legal Test without citing to case law[216] even

212. *Id.*

213. *Id.*

214. An alternative explanation is that the *Begay* court felt obligated to announce that ICRA due process requires notice and a hearing and that rather than being an occasion for unwitting assimilation, the court merely justified the preordained rule by reference to customary practices. This is not a compelling account, however, because there are many other cases where the Navajo Supreme Court indeed has adopted unique standards on the basis of customary tribal practices. *See, e.g.*, Downey v. Bigman, 22 Indian L. Rep. 6145 (Navajo 1995) (Re-Targeting the jury right).

215. *See, e.g.*, Palmer v. Millard, 23 Indian L. Rep. 6094 (Colville Ct. App. 1996) (discussing "due process" but not citing to ICRA's fourth amendment analogue); Hopi Tribe v. Kahe, 21 Indian L. Rep. 6079 (Hopi Tribal Ct. 1994) ("warrant" and "probable cause"); Carmenoros v. S. Ute Indian Tribe, 18 Indian L. Rep. 6147 (S.W. Intertribal Ct. App. 1991) ("due process"); Williams v. Cheyenne River Sioux Tribe, 18 Indian L. Rep. 6091 (Cheyenne River Sioux Ct. App. 1991) (same); George v. Shoshone Bannock Tribes, 16 Indian L. Rep. 6084 (Shoshone Bannock Tribal Ct. 1989) ("due process" and "equal protection").

216. *See, e.g.*, Murphy v. Standing Rock Sioux Election Comm., 17 Indian L. Rep. 6069, 6071-72 (Standing Rock Sioux Tribal Ct. 1990) (holding that due process

when other parts of the decision cite to legal authority to establish legal propositions.[217] Ready invocation of ICRA's terminology and doctrine without statutory and case citation suggests that the Anglo concepts have worked their ways into tribal judges' basic professional vocabularies and way of thinking.[218] Furthermore, and quite remarkably, tribal courts sometimes attribute the legislative purposes of advancing due process and other Anglo values to tribal ordinances, and accordingly construe the ordinances in ways that reflect those doctrines.[219]

Another sign of deep assimilation is that tribal courts sometimes adopt federal doctrines without apparently recognizing that there are plausible alternatives.[220] For example, in *In re D.N.*,[221] the Hopi Children's Court decided that a teacher's search inside a student's waistband violated ICRA's guarantee against unreasonable searches. The court recognized that federal case law was "not binding upon this court" but consulted federal law for guidance in determining the merits of whether the teacher's search had been unlawful.[222] Once the court determined a violation had occurred, however, it immediately concluded that the evidence was to be excluded. The court did not cite to a single federal case to substantiate its decision to apply the exclusionary remedy, nor did it consider whether the exclusionary remedy fit the tribal context.[223] The court's reflexive adoption of the

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requires notice and hearing without citing to case law); *In re* B.F.C., 21 Indian L. Rep. 6035 (Nook. Ct. App. 1990) (same); Confederated Salish and Kootenai Tribes v. Peone, 16 Indian L. Rep. 6136, 6137 (Confederated Salish & Kootenai Tribal Ct. 1989) (waiver of trial right is valid when it is "made knowingly and intentionally").

217. *See, e.g.*, Muscogee (Creek) Nation v. Am. Tobacco Co., 25 Indian L. Rep. 6054 (Muscogee Nation D. Ct. 1998) (enumerating requirements of due process without case law citation while citing to statutory language from other piece of legislation in course of court's opinion).

218. Although not the primary concern of this Article, the reality of deep assimilation gives credence to the view that ICRA imposed Anglo values notwithstanding the fact that it granted the tribes the power to construe its terms. *See* Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 Ark. L. Rev. 77, 124-25 (1993).

219. *See, e.g.*, Johnson v. Belgarde, 25 Indian L. Rep. 6183, 6184 (Hopi App. Ct. 1996) (defining tribal ordinance term of "good cause" as requiring "reasonable notice of a hearing and an opportunity to be heard"); Martin v. Hopi Tribe, 25 Indian L. Rep. 6185, 6186 (Hopi App. Ct. 1996) (explaining policy behind a tribal ordinance as being the protection of due process rights; "'the duty of the Tribal Courts to hear and determine all cases before it in a fair and impartial manner' . . . is rooted in sound public policy and in statutes designed to protect a litigant's right to constitutional due process" (citation omitted)).

220. This is consistent with the point made above that precedent can blunt imagination. *See supra* notes 79-81 and accompanying text.

221. 22 Indian L. Rep. 6071 (Hopi Child. Ct. 1995).

222. *Id.*

223. *See also* Winnebago Tribe of Neb. v. Pretends Eagle, 24 Indian L. Rep. 6240, 6244 (Winnebago Tribal Ct. 1997) (adopting exclusionary rule "without deciding the policy reasons for this action" or pointing to tribal custom).

Anglo approach suggests deep assimilation because the court did not even appear to appreciate that it had made a nonaxiomatic election.

Additional evidence of deep assimilation of constitutional values comes from the analysis in subsection four of substantive ICRA doctrines that have been developed in tribal courts. The study indicates that tribal courts have assimilated many Anglo values because much of the ICRA case law bears a significant resemblance to federal constitutional law.

4. Review of ICRA Case Law

This subsection examines tribal court interpretation of ICRA. It describes in rich detail the nature of the questions that have been presented to tribal courts, the substantive holdings of the tribal court cases, and the methodologies of interpretation that the tribal courts utilized. Rather than provide a case-by-case analysis of roughly 250 claims reported in 193 cases,[224] this subsection proceeds serially through the major ICRA guarantees and provides an overview of the most frequently litigated issues and outcomes. In the process, this section points out the courts' methodologies of interpretation and identifies the "Hard Cases," i.e., cases with results or reasoning that likely would be troubling to enthusiasts of American constitutional law. Whether a case qualifies as a "Hard Case" is analyzed without recourse to a thick political theory for the purpose of providing analysis that is relevant to the widest possible audience.[225] Finally, this section analyzes the Hard Cases under the thick Rawlsian political theory outlined above.[226]

The overview provides several useful vantage points for assessing whether the potential risks of having multiple authoritative interpreters have materialized in ICRA. The methodologies and substantive holdings of the tribal courts shed light on the strength of the two possible threshold objections (i.e., bad faith interpretation and structural incapacity) because case law demonstrates that the tribal courts have taken their responsibility to construe ICRA seriously. The case law also reflects deep assimilation of Anglo constitutional principles and an intriguing jurisprudential syncretism that further indicates the good faith interpretation of ICRA by tribal courts. Even without invoking deep political theory, the cases' substantive holdings support the inductive conclusion that the ICRA regime has not imposed significant costs *vis-a-vis* Protection; the cases are strongly rights-protective, even if the actual doctrines vary somewhat from ordinary federal case law. The Hard Cases provide an opportunity to concretely examine the possible costs incurred by the ICRA regime.

224. *See infra* Appendix A (listing all cases and providing other raw data).
225. *See supra* Part II.B.2.(a).
226. *See id.*

None of the holdings in the Hard Cases appears problematic under a Rawlsian framework. Finally, the litigated issues reveal that non-ICRA jurisdictional limitations on tribal courts ensure that ICRA litigation decides issues localized to Indian country and, therefore, ICRA's regime of multiple authoritative interpreters produces practically no externalities.

a. *Due Process*

The most heavily litigated provision in the reported cases was due process. One hundred thirty-four of the two hundred forty-seven litigated claims were due process. Sixty-five of these claims were resolved in favor of the complainants and sixty-nine in favor of the government. Analysis of the case law reveals significant degrees of Adapted Adoption of federal doctrine; tribal courts have engaged in a significant amount of Tailoring and Fitted Incorporation and some Re-Standardizing to accommodate unique tribal values and needs. Almost all of the decisions strongly protect individual rights. Only a few qualify as Hard Cases. After further analysis of the Hard Cases, it is evident that none of them runs afoul of a Rawlsian thick political theory. Finally, none of the due process decisions creates significant externalities.

Most due process claims concerned notice and hearing requirements across different contexts. In these decisions, tribal courts tend to be protective of tribal members' rights and to engage in either Tailoring or Incorporation (both Fitted and Stock Incorporation). In many cases, the issue was whether particular arms of tribal government were required to provide notice and hearing to potentially affected persons in particular instances.[227] For example, one court utilized Fitted Incorporation in holding that due process is violated when the challenger of a tribal election is not given notice as to the date and time of a post-election hearing conducted by the election commission.[228] Another court employed Stock Incorporation in the course of holding that notices of suspension from a public employer must give employees "a sufficient understanding of the facts behind the suspension so that they can consider whether to grieve the suspension."[229] Many cases—both criminal and civil—have held

227. *See, e.g.*, Lezard v. Colville Confederated Tribes, 22 Indian L. Rep. 6135, 6135 (Colville Ct. App. 1995) (tribal court must provide notice and right to hearing before holding party in criminal contempt); Tulalip Hous. Auth. v. Alcombrack, 22 Indian L. Rep. 6119, 6121 (Tulalip Ct. App. 1994) (applying due process notice and hearing requirements against tribal housing authority).

228. *See* Murphy v. Standing Rock Sioux Election Comm'n, 17 Indian L. Rep. 6069, 6072 (Standing Rock Sioux Tribal Ct. 1990).

229. White v. Ho-Chunk Nation Dep't of Pers., 24 Indian L. Rep. 6182, 6185-86 (Ho-Chunk Nation Tribal Ct. 1996) (pointing to federal case law for the proposition that the employee had a protectible due process interest in her employment that

ordinances void for vagueness because they provided inadequate notice of the required or proscribed behavior.[230] One tribal court Re-Standardized so as to provide tribal members greater protections than those afforded by federal law.[231] In many cases, the courts applied Fitted or Stock Incorporation to reverse government officials' run-of-the-mill neglect to afford affected parties a hearing[232] or the government's failure to abide by its own procedures and regulations.[233]

While the study uncovered no tribal cases rejecting the federal rule that due process requires hearing and notice, the tribal courts frequently engaged in Tailoring and Fitted Incorporation to accommodate tribal customs, values, and needs. For example, for purposes of determining whether an "ordinary" person can understand a statute for purposes of void-for-vagueness analysis, one court looked to the "ordinary Navajo person, who very often will be bilingual, with English as a second language."[234] Similarly, several tribal courts have held that due process' notice requirement is satisfied by posting and other methods of public announcement that, given the realities of tribal life, are reasonably calculated to inform interested parties.[235] Another set of cases utilizing Subjective Tailoring has ruled on the basis of tribal custom that due process requires that virtually any nonparty be provided an opportunity to have her views heard in court based on tribal custom.[236]

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accordingly triggered notice and hearing requirements).

230. *See, e.g.*, Burns Paiute Indian Tribe v. Dick, 22 Indian L. Rep. 6016, 6017-18 (Burns Paiute Ct. App. 1994) (civil); Stepetin v. Nisqually Indian Cmty., 20 Indian L. Rep. 6049, 6050-51 (Nisqually Ct. App. 1993) (criminal).

231. *See supra* notes 174-79 and accompanying text.

232. *See, e.g.*, McKinney v. Bus. Council of the Shoshone-Paiute Tribes, 20 Indian L. Rep. 6020 (Duck Valley Tribal Ct. 1993) (reinstating judge of tribal court dismissed by council without a hearing: Subjective Incorporation); *In re* B.F.C., 21 Indian L. Rep. 6035 (Nook. Ct. App. 1990) (reversing trial court's summary dismissal of a case after the trial court had refused to allow the party to be heard on a motion to continue: Objective Incorporation).

233. *See* Pioche v. Navajo Bd. of Election Supervisors, 18 Indian L. Rep. 6071, 6073 (Navajo 1991); Carmenoros v. S. Ute Indian Tribe, 18 Indian L. Rep. 6147 (S.W. Intertribal Ct. App. 1991); One Feather v. Oglala Sioux Tribal Pub. Safety Comm'n, 16 Indian L. Rep. 6042, 6043 (Oglala Ct. App. 1986).

234. Bennett v. Navajo Bd. of Election Supervisors, 18 Indian L. Rep. 6009, 6012 (Navajo 1990) (deploying Subjective Tailoring).

235. *See, e.g.*, Rave v. Reynolds, 23 Indian L. Rep. 6150, 6169 (Winnebago Sup. Ct. 1996) (Subjective Tailoring); Baldy v. Hoopa Valley Tribal Council, 22 Indian L. Rep. 6015, 6016 (Hoopa Valley Ct. App. 1994) (same).

236. *See* Johns v. Leupp Sch., Inc. 22 Indian L. Rep. 6039, 6039 (Navajo 1995) (discussing how a "'broad scope of inquiry is in keeping with the general Navajo common law rule of due process .... The Navajo people have an established custom of notifying all involved parties in a controversy and allowing them, and even other interested parties, an opportunity to present and defend their positions.' All perspectives are important for a court to hear when making discretionary rulings" (quoting Begay v. Navajo Nation, 15 Indian L. Rep. 6032, 6034 (Navajo 1988))); *In re* Estate of Tasunke Witko v. Heileman Brewing Co., 23 Indian L. Rep. 6104, 6108

Under the rubric of due process, tribal courts have imposed obligations on various arms of tribal government to proactively provide information to tribal members. For example, in *Simplot v. Ho-Chunk Nation Department of Health*,[237] the tribal court held that a tribal agency violated due process by failing to inform an employee that he had a right under personnel procedures to displace less senior workers. Similarly, in *Knudson v. Ho-Chunk Nation Treasury Department*[238] the tribal court ruled that due process requires that terminated public employees be given the identical data relied upon by their supervisors so employees can adequately represent themselves during the administrative review process. The *Knudson* decision illustrates the deep assimilation of Anglo values because the court did not cite case law or statutory provisions. Another tribal court held that due process requires that judges inform persons jailed for contempt that they are entitled to a hearing of indigence at which they will be freed from jail if they demonstrate poverty.[239] Similarly, in *Hopi Tribe v. Mahkewa*,[240] the court determined that tribal police must inform persons stopped for drunk driving that they have a right to obtain an independent blood-alcohol test. The *Mahkewa* court engaged in Re-Standardizing, ruling that due process "include[s] and require[s] that defendants have a fair chance to obtain potentially exculpatory evidence to prepare their defense."[241] The *Mahkewa* court went on to note that failing to inform people of their right to an independent test "would in effect suppress evidence favorable to the defendant and would be violative of due process of law."[242]

Relying on due process, tribal courts have fashioned many other protections and relief. One court concluded that due process imposes a litany of requirements on the tribal police with respect to arrestees.[243] Another court held that due process grants public

(Rbd. Sioux Sup. Ct. 1996) (en banc) (referring to "traditional Lakota notions of due process that provide everyone the opportunity to be heard before making a decision").

237. 23 Indian L. Rep. 6235, 6241 (Ho-Chunk Tribal Ct. 1996).

238. 26 Indian L. Rep. 6011, 6011 (Ho-Chunk Sup. Ct. 1998).

239. *In re* Consol. Small Claims Cases, 24 Indian L. Rep. 6109, 6109 (Cheyenne River Sioux Tribal Ct. 1996).

240. 21 Indian L. Rep. 6139, 6140 (Hopi Tribal Ct. 1992), *aff'd*, 25 Indian L. Rep. 6144 (Hopi App. Ct.).

241. *Id.* at 6140.

242. *Id.*

243. *See* Drags Wolf v. Tribal Bus. Council of the Three Affiliated Tribes, 17 Indian L. Rep. 6051, 6052 (Fort Berthold Tribal Ct. 1990). The requirements are:

> 1. Each defendant will be given a written, verified complaint following his arrest. 2. Each defendant will be provided with a copy of such complaint at his arraignment, if not in possession of a copy at that time. 3. Each defendant shall be read and contemporaneously given a detailed explanation of his rights and written acknowledgment of such by each defendant shall be filed with the clerk of court. 4. That in addition to advising each defendant as to the alleged violations of tribal law, a meaningful explanation by the

employees a right to representation at termination hearings.[244] In *Burns Paiute Indian Tribe v. Dick*,[245] the tribal court Re-standardized and reversed a trial court's order excluding several members from the reservation.[246] The *Burns* court adopted a novel rule: due process is violated when a court fails to give consideration to a liberty interest in the course of its opinion.[247] The *Burns* court also determined that family relationships implicate the liberty interest of "intimate association[s]."[248] The court further noted that the lower court violated due process because the excluded members had wives and children on the reservation and the trial court failed to "consider[] these relationships and the serious, resulting breakup of the appellants' families and the effect on the tribal community."[249]

One set of potential Hard Cases spotlights the tribal courts' tendency to avoid highly formalistic interpretations of the law and, instead, focus on the practical consequences of the legal edict at issue. For example, in *Hopi Tribe v. Lonewolf Scott*,[250] the tribal court Re-Standardized when it rejected a void-for-vagueness challenge to a tribal ordinance. Eschewing the federal standard under which statutes may be void for vagueness if there is the mere "possibility of discriminatory enforcement" and lack of notice,[251] the tribal court conducted a realistic, highly contextualized analysis of how the affected community understood the challenged ordinance and stated that:

> [i]t seems theoretic conjecture that the defendants claim that they did not understand the plain language of the statute .... The Hopi courts have properly limited the application of this statute so as to not overstate the criminal sanctions imposed on a defendant. Its meaning and application is clear to the police, prosecutors, and the reservation communities. There have been no episodes of capricious or arbitrary arrests based on [the ordinance] and the Hopi courts

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judge-magistrate with a layman's explanation as to the specific elements of the alleged crime in order that a defendant having never previously appeared in court and unschooled in legal jargon could reasonably be expected to ascertain if his conduct did in fact violate tribal law.

Id.

244. *See* Johnson v. Mashantucket Pequot Gaming Enter., 25 Indian L. Rep. 6011 (Mashantucket Pequot Ct. App. 1996) (holding that due process was violated where administrative law judge disallowed attorney from representing employee).

245. 22 Indian L. Rep. 6016 (Burns Paiute Ct. App. 1994).

246. *See id.*

247. *See id.* at 6017.

248. *Id.*

249. *Id.* The appellate court concluded that these relationships implicated the liberty to "associate with persons of one's choice," which is the "the right of 'intimate association.'" *Id.*

250. 14 Indian L. Rep. 6001, 6005 (Hopi Tribal Ct. 1986).

251. Gentile v. State Bar of Nev., 501 U.S. 1030, 1082 (1991) (O'Connor, J., concurring).

> have applied this criminal statute in a uniform, consistent, and limited manner . . . .[252]

It can be argued that the *Lonewolf* court's upholding of a criminal ordinance that was in fact ambiguous simply because there had not yet been discriminatory enforcement threatens the value of Protection. Similarly, in *Moore v. Hoopa Valley Tribe*,[253] the tribal court found no due process violation even though the language in the trial court's order was considered objectively ambiguous by the appellate court because the defendant had actual notice of the trial court's contempt hearing.[254]

How problematic are these cases of subjective, realistic interpretation from the vantage point of the value of Protection? A critic might be partially comforted upon learning that some tribal courts have adopted the federal "objective" standard.[255] But it is far from clear that the subjective approach undermines Protection. Adoption of an objective approach in the federal case law may be less a categorical rejection of the subjective approach and, instead, more a reflection of the implausibility of a single subjective understanding across the large and diverse national citizenry. By contrast, in the context of small, homogeneous communities, there may exist a common subjective understanding notwithstanding "objective" ambiguity.[256] Indeed, the Supreme Court has repeatedly utilized subjective analysis to uphold criminal provisions "[n]otwithstanding the[ir] apparent indeterminateness" in the military context because the provisions are applicable to only a discrete community where "what those crimes are, and how they are to be punished" was "well known."[257] More fundamentally, insofar as the meaning of English

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252. *Lonewolf*, 14 Indian L. Rep. at 6005 (citation omitted).

253. 26 Indian L. Rep. 6013 (Nw. Reg'l App. Ct. 1998).

254. This tendency toward subjective rather than objective interpretation is found outside the due process context. *See, e.g.*, Pueblo of Pojoaque v. Jagles, 24 Indian L. Rep. 6137 (Pojoaque Pueblo Tribal Ct. 1997) (trial by jury); *see also infra* notes 405-06 and accompanying text.

255. *See, e.g.*, Burns Paiute Indian Tribe v. Dick, 22 Indian L. Rep. 6016, 6018 (Burns Paiute Ct. App. 1994) (dismissing argument that "the ordinance could be interpreted in that manner but it was not the tribe's policy to do so").

256. This observation may not hold in respect of the *Lonewolf* case insofar as the defendants were not members of the Hopi Tribe. *See Lonewolf*, 14 Indian L. Rep. at 6001. On the other hand, defendants belonged to a tribe that shared the Hopi border and may have had shared cultural understandings, as the tribal court suggested when it spoke of the ordinance's clear understanding to the "reservation communities." *Id.* at 6005.

257. Dynes v. Hoover, 61 U.S. 65, 82 (1857) (military law), *quoted approvingly in* Parker v. Levy, 417 U.S. 733, 747 (1974). The Court in *Parker* also upheld a void-for-vagueness challenge to two articles in the Uniform Code of Military Justice that the Court acknowledged would not have passed constitutional muster "as measured by contemporary standards of vagueness applicable to statutes and ordinances governing civilians." *Parker*, 417 U.S. at 741 (citation omitted). The military code provisions were upheld because, inter alia, the "content" of the provisions "may be supplied . . .

words is a product of cultural understanding rather than a reflection of some "natural" and inherent quality of the word, it well could be argued that the division between "subjective" and "objective" understandings is false and that all understandings are subjective.[258] If this is true, it is thoroughly sound to construe legal terms' meanings by reference to the likely understandings of the parties that are to be affected by the law.[259] Where the affected persons are part of a small community, it is sensible to directly consult the community's "subjective" understandings of the terms in issue.[260] Only when those affected are a State or national constituency does it become necessary to perform an "objective" analysis that, in reality, is a measure of the range of the likely subjective understandings held by the wide range of persons affected by the state or federal regulation.[261]

Returning to the overview of the ICRA due process case law, the challenges of securing justice for indigent parties have spurred many tribal court procedural innovations. For example, although the ICRA guarantee to the right of counsel does not include a requirement that tribes provide counsel to indigents,[262] one tribal court has held that due process requires counsel where charges are serious and defendants have limited education and understanding.[263] Other courts have imposed duties on judges who hear criminal cases in which the defendant is unrepresented. One tribal appellate court ruled that trial judges must inform *pro se* defendants of the lesser included offense doctrine and must rule *sua sponte* on the sufficiency of the prosecution's evidence at the end of the prosecution's case.[264] The tribal appellate court in *Teeman v. Burns Paiute Indian Tribe*[265] went so far as to impose a duty on trial judges to research certain questions of law for *pro se* defendants. The trial court had refused to recognize the defense of self-defense unless the defendant could find a legal source for it. The *Teeman* court stated that "[w]hen all the resources, training and background knowledge in law repose within the government, it is basically unfair to shift to the presumptively

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by less formalized custom and usage" within the military community. *Id.* at 754. For a discussion of the role played in *Parker* by the presence of a discrete community, see Rosen, *Our Nonuniform Constitution*, *supra* note 7, at 1175-76, 1178-79.

258. *See* Susan A. Handelman, The Slayers of Moses 3-4 (1982); David Couzens Hoy, *Interpreting the Law: Hermeneutical and Post-structuralist Perspectives*, 58 S. Cal. L. Rev. 135, 138-39 (1985).

259. *See* Hoy, *supra* note 258, at 151-52.

260. *See supra* note 258.

261. *See* Hoy, *supra* note 258, at 157-64.

262. 25 U.S.C. § 1302(6) (1994).

263. *See* Colville Confederated Tribes v. Thomas, 18 Indian L. Rep. 6126 (Colville Ct. App. 1990).

264. *See* S. Ute Tribe v. Baca, 17 Indian L. Rep. 6010, 6011-12 (S. Ute Ct. App. 1989).

265. 25 Indian L. Rep. 6197, 6199 (Burns Paiute Ct. App. 1997).

innocent defendant the burden of proving the law."[266] The *Teeman* court went on to note that the law instead "plac[es] responsibility on the trial court judge to rule upon the questions of law presented at the trial... [a]n unbelievably unfair result obtains when the guilt or innocence of a *pro se* defendant is decided upon his or her ability to research law."[267] The court concluded that due process is violated when the law "places upon an accused the burden of proving that the law will permit the introduction of evidence of an exculpatory nature."[268]

Other tribal courts have placed duties on trial judges that are designed to ensure that substantive justice is attained. For example, one court concluded that when parties are indigent, not represented by council, and untutored in the law, tribal court judges should take an active role akin to judges in Germany's inquisitorial system. The judge's role may include propounding legal theories and developing the facts.[269] Another tribal court has indicated that judges may lead the questioning at legal hearings,[270] and yet another stated that judges may have *ex parte* communications with potential witnesses if the court subsequently informs the parties of the substance of the communications and permits the parties to respond.[271]

Although these cases exhibit a noble intent to assist the impecunious, some may consider them Hard Cases on account of the significant powers they grant to judges. Further reflection, however, reveals strong reasons why these may not qualify as Hard Cases. First, similar proactive and discretionary powers are exercised by administrative law and bankruptcy judges, who "share other characteristics with the inquisitorial model of dispute resolution."[272] In any event, to the extent that tribal judges exercise greater discretion than do federal judges, such differences are not necessarily problematic. Structural considerations can provide a compelling justification for differential institutional arrangements,[273] and tribal

266. *Id.*
267. *Id.*
268. *Id.*
269. *See* Butler v. Siletz Tribal Council, 16 Indian L. Rep. 6044, 6044-45 (Siletz Tribal Ct. 1989).
270. *See* Clown v. Coast to Coast, 23 Indian L. Rep. 6055, 6057-59 (Cheyenne River Sioux Ct. App. 1993). To prevent judges from acting in an "authoritarian manner," however, the *Clown* court also provided extensive guidelines with regard to *pro se* trials that included, for example, instructions to the court to expressly give parties the choice to either question the opposing party themselves or have the court do it. *Id.* at 6058-59.
271. *See* Miner v. Banley, 22 Indian L. Rep. 6044, 6046 (Cheyenne River Sioux Ct. App. 1995).
272. Rosen, *Recent American Codifications*, *supra* note 38, at 1210-11. Moreover, even ordinary federal trial court judges "may appoint an expert witness [and] examine such a witness himself." *Id.* at 1211.
273. *See* Rossi, *supra* note 13, at 1222-38.

judges are more likely to be politically accountable to tribal communities than federal judges are to the people whose disputes they hear; tribal judges typically do not enjoy life tenure and tend to interact more directly with the people over whom they exercise power than do federal judges due to the smaller size and greater social cohesiveness of most tribal communities. Such accountability makes discretion more palatable, for the possibility of a meaningful communication of community dissatisfaction likely serves as a check on the tribal judges.

Perhaps the most difficult set of Hard Cases are those instances where tribal courts give what might be deemed excessive weight to the community's interests in the due process calculus. For example, in *Ben v. Burbank*,[274] the tribal court upheld against a due process challenge a tribal ordinance that gave appellate courts the power to refuse to hear appeals where "substantial justice" had been done between the parties.[275] The appellant in *Ben* refused to pay for construction that had been performed by a relative.[276] After years of informal efforts to collect the debt, the relative sued successfully in court.[277] On appeal, the appellant argued that the trial court had applied the incorrect statute of limitations and, therefore, the case should have been dismissed.[278] The *Ben* court dismissed the appeal, refusing to even hear appellant's argument on the statutory grounds that there was no appellate review because there had been "substantive justice."[279] In upholding the ordinance limiting appellate jurisdiction, the *Ben* court ruled that due process rights are "'fundamental, but they are not absolute, limitless, or unrestricted'" and held that the tribe's interests outweighed the appellant's interest in seeking to "hid[e] behind her statute of limitations claim in order to avoid paying for the work."[280] The tribe's interests were to achieve substantive justice, which furthers the "concept of community good and moral right," and to advance *k'e*, which refers to a person's "deep feeling for responsibilities to others and the duty to live in harmony with them."[281]

Helgeson v. Lac Du Flambeau Band of Lake Superior Chippewa Indians[282] is an even more troubling case. In *Helgeson*, the tribal appellate court upheld a trial court's finding that the defendants had violated a noncriminal ordinance that prohibited the possession of

274. 24 Indian L. Rep. 6001 (Navajo 1996).
275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.* at 6001-02 (quoting *In re* Estate of Plummer, 17 Indian L. Rep. 6151 (1990)).
281. *Id.* at 6001.
282. 25 Indian L. Rep. 6045 (Lac Du Flambeau App. Ct. 1998).

certain types of gambling devices despite a fundamental error by the trial court.[283] In a trial whose "whole purpose . . . was to determine if the devices were contraband," the lower court prematurely ruled that the devices at issue constituted gambling devices.[284] The appellate court analyzed the due process issue by means of a balancing test drawn from federal law but employed Tailoring to ascertain the appropriate weight to accord the community's interest. The appellate court stated that "[p]rior to European influence, it was a well accepted belief throughout Indian [c]ountry that individual rights lie subordinate to the rights of the tribe" and described ICRA as a Western "imposition" that "infringe[d] on the rights of Indians to govern themselves."[285] Nevertheless, ICRA "still provides for the balancing test in which a tribal court can weigh the rights of an individual versus the rights of the tribe."[286] Weighing the costs imposed on the individuals by a monetary fine and forfeiture of the seized devices against the potential costs on the tribe resulting from the loss of the right to regulate gaming activity—a risk because the illegal devices violated the tribal-state gaming compact pursuant to which the tribe was permitted to run its casino—the appellate court concluded that the tribe's gaming operations was "one of the most precious economic resources [the tribe has] ever had" and upheld the conviction.[287]

The *Ben* and *Helgeson* cases are the most threatening due process cases to Protection. It is not clear, however, that these cases in fact constitute Hard Cases. The balancing that occurs in tribal court opinions is different in degree, rather than kind, from what occurs in federal decisions because constitutional due process rights also typically involve *de facto*, if not *de jure*, balancing.[288] Monetary considerations are deemed a relevant factor in quantifying the government's interest in federal due process case law,[289] and the tribal interest in securing gaming is particularly strong because most tribal communities were deeply impoverished and incapable of providing basic essentials to their members before the income streams from gambling began to flow. Federal habeas case law disallowing review for procedural defaults unless defendants can "demonstrate that the failure to consider the claim will result in a fundamental miscarriage

283. *Id.* at 6053.
284. *Id.*
285. *Id.* I have made a similar argument. *See* Rosen, *Outer Limits*, *supra* note 7, at 1134-40.
286. *Helgeson*, 25 Indian L. Rep. at 6053.
287. *Id.*
288. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 263 (1970) (balancing welfare recipient's interest versus the government's interest to determine the nature of the hearing required by due process: *de jure* balancing).
289. *See, e.g.*, *id.* at 265.

of justice"[290] is useful in appropriately contextualizing *Ben* and *Helgeson.* Substantive review in both the federal habeas case law and the tribal court cases is tied to substantive fairness.[291] In any event, even if the *Ben* and *Helgeson* courts accorded the community's interests greater weight than would federal doctrine, this would not necessarily mean that they violated the value of Protection. It would first be necessary to develop a normative theory to identify the quantum of weight allocated to governmental interests that are problematic. The cases are not troubling when analyzed under the thick Rawlsian political theory discussed earlier because in neither case did the community court's decision interfere with a person's ability to exit Indian country or threaten the well-orderedness of general society.[292]

b. *Equal Protection*

There were thirty-five published opinions concerning ICRA's equal protection guarantee. Courts ruled against the tribe in twelve cases, though two of these were later reversed by the case most challenging to the value of Protection. The equal protection case law continues the twin trends of Adapted Adoption and assimilation that appear in the tribal due process jurisprudence.[293]

The case of *Bennett v. Navajo Board of Election Supervisors*[294] is a strong rights-protecting equal protection decision that showcases both Tailoring and assimilation. In *Bennett*, the court struck down an ordinance placing requirements on who could run for public office. By invoking the federal equal protection doctrine of "fundamental rights" without citing to federal case law, the *Bennett* court most likely is exhibiting assimilation.[295] The court then Tailored, looking to tribal

290. Coleman v. Thompson, 501 U.S. 722, 750 (1991).

291. To be sure, the federal habeas doctrine in *Coleman* and the *Ben* court's holdings are different in that the appellant in *Coleman* had an opportunity to appeal. Nevertheless, Coleman is instructive because the scope of *de facto* review in both cases turned on an assessment of whether the status quo violated substantive justice.

292. *See* Rosen, *Outer Limits*, *supra* note 7, at 1093-1106, 1126-27. Well-orderedness would be implicated by the imposition of significant externalities on non-Indian society or the presence of activities within Indian country that were so troublesome to general society as to undermine general society's cohesiveness or sense of self. *Id.* The two cases do not impose significant externalities; *Helgeson* creates none, and *Ben* deploys activist judicial arguments to achieve an outcome that most people likely would consider fair. Furthermore, the parallels between the two cases and federal case law suggest that they are not sufficiently troublesome to potentially unravel general society.

293. A series of equal protection cases were brought by non-Indians and non-member Indians, claiming that the differential treatment they received as "outsiders" of the tribe violated equal protection. I examine these cases below in "The Treatment of Outsiders." *See infra* Part IV.B.4.(h).

294. 18 Indian L. Rep. 6009 (Navajo 1990).

295. *Id.* at 6012. An alternative explanation for the reference to "fundamental rights" without case law citation is that the court consulted the federal case law but

traditions and deciding that the "political liberty" to run for office, "a part of the concept of republican participatory democracy [that is] grounded in Navajo tradition," constituted a "fundamental right" that was infringed upon by the ordinance in question.[296]

In *Griffith v. Wilkie*,[297] another tribal court relied upon equal protection to construe a tribal ordinance. The issue in *Griffith* was whether an ordinance providing that "[t]he mother of an illegitimate unmarried child is entitled to its custody, services, and earnings" absolutely precluded fathers from being awarded custody.[298] The tribal court engaged in Tabula Rasa, concluding that if the ordinance were "interpreted as eliminating a father of an illegitimate child as a potential custodial parent, he is denied equal protection of the law."[299] The court construed the ordinance as providing a presumption of maternal custody if paternity were undeterminable, but imposing the best interest of the child test if the father were known.[300]

Several of the reported cases concerned allegations of selective enforcement of tribal law. The most aggressive interpretations of equal protection can be seen in two cases, each of which was a consolidation of numerous criminal cases. In *Matter of Consolidated Criminal Cases*,[301] Mark Fox, a member of the Tribal Council who sat on the Judicial Committee and was not a party in either of the consolidated cases, had been charged with assault in December of 1996 but had delayed his prosecution for over a year by transferring the prosecutor originally assigned to him and failing to appoint a replacement. Fifteen tribal members who had been charged with various crimes around the same time as Fox, but whose prosecutions

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for some reason simply did not cite to it. This seems unlikely, however, because the court cited to numerous federal cases elsewhere in its opinion. *See id.* at 6011-12.

296. *Id.* ("In Navajo tradition, government and governing was a matter of consensus of the people, and Navajos had a participatory democracy. It was, in fact, one of the purest democracies in human history. Long before the United States of America extended the privilege and right to vote to those who did not own property and to women, all Navajos participated in public decisions. Therefore, there is a strong and fundamental tradition that any Navajo can participate in the processes of government, and no person who is not otherwise disqualified by a reasonable law can be prohibited from holding public office.").

297. 18 Indian L. Rep. 6058 (N. Plains Intertribal Ct. App. 1991).

298. *Id.* at 6059.

299. *Id.* Similarly, the Supreme Court struck down on due process grounds a statutory presumption that unwed fathers are unfit for custody. *See* Stanley v. Illinois, 405 U.S. 645, 649 (1972) (holding that due process requires that unwed fathers have a right to a hearing on their parental fitness). The *Wilkie* court's equal protection decision thus protects unwed fathers' rights in the same way as the Supreme Court's due process case law does. The tribal court's holding, which was premised on a different provision and did not invoke the Supreme Court precedent, thus illustrates both the reasonableness of the trial court's approach and the tribe's jurisprudential independence.

300. *See Wilkie*, 18 Indian L. Rep. at 6059-60.

301. 15 Indian L. Rep. 6062 (Three Affiliated Tribes of the Fort Berthold Reservation D. Ct. 1997).

had gone forward, brought equal protection challenges.[302] Without identifying a Legal Test,[303] the tribal court accepted the fifteen defendants' arguments and dismissed the criminal cases against them.[304] Similarly, in *Conroy v. Bear Runner*[305] the tribal court found that an ordinance imposing an occupation tax had been selectively applied, and therefore, violated equal protection. Citing to federal case law, the *Conroy* decision engaged in Stock Incorporation[306] and adopted the Legal Test that equal protection is violated "where the statute or ordinance, although valid on its face, is enforced so as to discriminate against certain persons, occupations or privileges of the same class."[307]

Other tribal courts, however, have erected a higher burden to finding an equal protection violation for selective enforcement of law. The Legal Tests employed by these courts are almost identical to the approach taken by the federal courts.[308] For example, in *Southern Ute Tribe v. Baca*,[309] the tribal court ruled against the claim that inconsistent prosecutorial practice with respect to the lesser included offense doctrine is a *per se* violation of equal protection. The court engaged in Fitted Incorporation, citing to federal case law to hold that "'aberrational implementation of proper criminal procedures does not give rise to an equal protection claim absent a showing of intentional or purposeful discrimination.'"[310] The court explained the rule by reference to tribal circumstances: "courts publish few written opinions identifying particular court practices . . . [and a] strict equal protection rule on procedural matters which would continually elevate particular variations in court practices to the level of equal protection claims would be unwise."[311] Similarly, in *Burns Paiute Indian Tribe v. Dick*,[312] the tribal court ruled that inconsistent enforcement of a tribal

302. *See id.* at 6059.

303. *See supra* note 60.

304. *See In re* Consol. Criminal Cases, 15 Indian L. Rep. 6062 (Three Affiliated Tribes of the Fort Berthold Reservation Dist. Ct., Nov. 19, 1997); *In re* Consol. Criminal Cases, 15 Indian L. Rep. 6062 (Three Affiliated Tribes of the Fort Berthold Reservation Dist. Ct., Oct. 10, 1997).

305. 16 Indian L. Rep. 6037, 6039 (Oglala Tribal Ct. App. 1984).

306. *Id.* The tribal court erred in its analysis of federal law, however, because the case upon which it relied did not establish this rule. *See id.* (citing Brodhead v. Borthwick, 174 F.2d 21 (9th Cir. 1949)).

307. *Id.*

308. For an example of the federal rule, see *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996).

309. 17 Indian L. Rep. 6010, 6011 (S. Ute Ct. App. 1989).

310. *Id.* at 6011 (quoting United States v. Doe, 401 F. Supp. 63, 65 (E.D. Wis. 1975)).

311. *Baca*, 17 Indian L. Rep. at 6011; *see also* Frost v. S. Ute Tribal Council, 23 Indian L. Rep. 6135, 6136 (S. Ute Tribal Ct. 1996) (stating that failure of a tribe to prosecute similar allegations in the past does not, in and of itself, violate equal protection).

312. 22 Indian L. Rep. 6016 (Burns Paiute Ct. App. 1994). This is virtually identical to the federal rule. *See Armstrong*, 517 U.S. at 464 (observing that "the

exclusion ordinance violates equal protection only when the tribe "has not excluded others similarly situated for similar conduct and the decision to exclude was based upon bad faith, or on impermissible grounds, as, for example, race, religion or the exercise of other constitutional rights."[313] Other tribal courts have adopted similar Legal Tests in response to equal protection challenges to the distribution of tribal resources.[314]

Another set of cases in the selective enforcement context displays tribal equal protection at its most and least rights-protecting. Two cases decided the same day by the same judge ruled that charging only males under a gender neutral statutory rape ordinance violates equal protection[315]—equal protection at its most protective. This rule was overturned, however, in *Winnebago Tribe of Nebraska v. Bigfire*.[316] The *Bigfire* court's opinion is the most threatening to Protection of all the 194 reported cases. Setting the stage for its analysis, the *Bigfire* court stated that "[l]ike most tribes, the Winnebago Tribe of Nebraska agreed to removal from their ancestral homelands and to the acceptance of new reservation lands precisely to preserve their separate cultural and political identity as a people."[317] Accordingly, the "tribal court is free to interpret the tribal constitution independently of the meaning afforded similar language in federal law."[318] The court further explained that:

> [t]his independence is not only a logical result of the sovereignty of the tribe as a separate political community within the United States, but also a necessary option to protect the separate and different cultural heritage of the tribe and to adapt the meaning of legal

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decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification'" (citation omitted)). Interestingly, the *Dick* court did not cite to any federal case law for the proposition of law, though it cited to federal case law elsewhere in its opinion. *See Dick*, 22 Indian L. Rep. at 6017. *Dick*, therefore, most likely is either an example of deep assimilation or of Tabula Rasa where the tribal court intuited the federal rule.

313. *Dick*, 22 Indian L. Rep. at 6017.

314. *See, e.g.*, Badgley v. Hoopa Forest Indus., 19 Indian L. Rep. 6009, 6009 (Hoopa Ct. App. 1990) (claim for failure to hire as log hauler; equal protection violated only where person "treated differently from other persons similarly situated on account of her marital status to a non-Indian, her race, sex or any other category"); Day v. Hopi Election Bd., 16 Indian L. Rep. 6057, 6058 (Hopi Tribal Ct. 1988) (fact that Hopi fluency requirement for candidates for public office was not enforced in past elections does not mean that its enforcement as to several candidates in the present election violates equal protection; question is whether at any point in time there is unequal treatment rising to the level of "unreasonabl[e] discriminat[ion]").

315. Winnebago Tribe of Neb. v. Levering, 25 Indian L. Rep. 6022 (Winnebago Tribal Ct. 1997); Winnebago Tribe of Neb. v. Frazier, 25 Indian L. Rep. 6021 (Winnebago Tribal Ct. 1997). There had been four prosecutions under the ordinance, and only males had been charged. *See Frazier*, 25 Indian L. Rep. at 6021.

316. 25 Indian L. Rep. 6229, 6234 (Winnebago Sup. Ct. 1998).

317. *Id.* at 6230.

318. *Id.*

> concepts derived from Anglo-American roots to the unique cultural context of communal tribal life.[319]

Finally, the court noted that there must be "sensitive adaptation of such legal concepts to the precise tribal community served by tribal law."[320] The *Bigfire* tribal court then Subjectively Re-standardized and Tailored, adopting the compelling interest test rather than the intermediate scrutiny test for gender discrimination under federal law, but finding a compelling governmental interest in gender-differentiated application of the statutory rape ordinance.[321]

The bulk of the *Bigfire* opinion sought to explain why gender differentiations constituted a compelling government interest in the tribal context. The court stated that "in determining what constitutes a compelling governmental interest, this Court must always look to the preservation of tribal culture, traditions, and sovereignty and to the promotion of the health and welfare of tribal members as the most compelling reasons for the formation and operation of tribal government."[322] Furthermore, the court noted that "traditional differentiations, commonly accepted and practiced by the Tribe without pejorative or discriminatory implications... must be sustained as involving the compelling tribal governmental interest of preserving tribal traditions and culture."[323] The court then cited to evidence suggesting that under tribal customs and tradition "gender role differentiation and gender differences in legal or customary treatment related to" roles that were deemed to be "natural and expected" and that such "gender differences or disparities in treatment do not signal hierarchy, lack of respect or invidious discrimination."[324] The court made it clear that the tribe's understanding of gender roles derived from tribal religious beliefs.[325] The court upheld the gender differentiated application of the statutory rape ordinance because "within the Winnebago culture, the male clearly is assigned the obligation of protecting the women. The areas of sexual misconduct and domestic abuse were specifically singled out as areas in which the Winnebago tradition and customary law assigned roles and responsibilities based on gender."[326]

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319. *Id.*

320. *Id.*

321. The *Bigfire* court correctly cited to *Craig v. Boren*, 429 U.S. 190 (1976), for the proposition that federal courts utilize intermediate scrutiny to analyze gender discrimination claims, and expressly and explicitly adopted strict scrutiny instead. *See Bigfire*, 25 Indian L. Rep. at 6231.

322. *Id.* at 6231.

323. *Id.* at 6233.

324. *Id.* at 6232.

325. *See id.* ("Gender differences constitute a natural part of life. Indeed, the Earth, the Grandmother who gives life, is female. Thus, gender role differentiation and gender differences in legal or customary treatment related to those roles are natural and expected.").

326. *Id.* at 6233.

In one sense, *Bigfire* could be said to be unproblematically akin to accommodations of religiously-based gender differentiations that federal anti-discrimination law accepts. Title VII's protections against gender discrimination, after all, are inapplicable when the employer is a "religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."[327] So too it could be said that the court in *Bigfire* simply is making accommodations on account of the religiously-based gender differentiations in Hopi culture.

Yet, even assuming some accommodations are appropriate, *Bigfire* remains disturbing. The most troublesome aspect of the *Bigfire* opinion from the perspective of Protection is that the court articulated virtually no external limits to tribal tradition on what types of gender differential treatment is unacceptable. As the court stated, only traditional practices with "pejorative or discriminatory implications" *as determined by tribal standards* will be struck down.[328] On the other hand, whose standards should govern? The *Bigfire* court correctly noted that the role of women in Ho-chunk communities "is not analogous to the roles of females in the Anglo-American cultures."[329] Those who take issue with *Bigfire* must justify why contemporary American sensibilities concerning gender should displace Ho-Chunk sensibilities. Answering this question requires a full-fledged normative theory of what types of variations from ordinary doctrine are acceptable within our liberal polity. Under the thick Rawlsian framework I have generated, the gender differentiation upheld in *Bigfire* would be acceptable because it, in all likelihood, interferes with neither exit nor well-orderedness.[330] *Bigfire*'s reasoning is problematic under that framework, however, because it suggests that the court would have upheld an educational system that deprived girls of education pursuant to a neutral tribal tradition—a practice that

327. 42 U.S.C. § 2000e-1(a) (1994).

328. *Bigfire*, 25 Indian L. Rep. at 6233.

329. *Id.* at 6232.

330. Exit is not implicated because the ordinance did not have the effect of eliminating a person's ability to choose where to live. The fact that the men convicted under the ordinance would be unable to leave Indian country during the time of their confinement does not mean that exit is implicated; this is true of all criminal ordinances, and incarceration pursuant to violation of rules to which people have consented does not violate exit. *See* Rosen, *Outer Limits*, *supra* note 7, at 1098-1100 (explaining this point). Nor could it be claimed that the ordinance at issue in *Bigfire* was unclear; it expressly prohibited the defendants' activities. While not free from doubt, it is likely that the *Bigfire* decision also does not violate the requirement of well-orderedness insofar as the view of gender relations underwriting the opinion, while distasteful to many in general society, likely falls within a range of reasonableness that is not sufficiently detestable to general society so as to threaten to unravel it.

would violate the exit right.[331] The *Bigfire* decision also threatens Protection in that it does not take account of the requirements of well-orderedness.[332]

c. *Search and Seizure*

There were thirteen cases concerning search and seizure. Four of the cases resulted in decisions favoring the citizens claiming rights against tribal governments, while most of the other cases involved factual settings in which tribal courts simply found that probable cause or reasonable suspicion existed.[333] In several cases, courts were not interpreting ICRA or a tribal constitution, but tribal criminal codes, several of which have adopted almost verbatim the federal doctrines. These latter cases are germane for present purposes for the same reason that tribal case law construing tribal constitutions is instructive.[334]

Search and seizure tribal case law evidences the trend of Adapted Adoption found elsewhere in the ICRA jurisprudence. Without exception, the doctrines found in the thirteen cases closely track federal case law; in fact, tribal courts in all cases utilized either Incorporation or Tailoring. This suggests that the tribal courts engaged in assimilation, as does the fact that the tribal courts sometimes recite the federal rules without citing to case law. One court even adopted the federal exclusionary remedy without appearing to have considered alternative remedies. Finally, there are few if any Hard Cases here; the reported search and seizure cases adopt Legal Tests that are at least as rights-protecting as federal law, and two cases establish Legal Tests that are more rights-protecting.

The case of *Winnebago Tribe of Nebraska v. Pretends Eagle*[335] is representative of the interpretive methodologies found in the ICRA search and seizure case law. In *Pretends Eagle*, a tribal member called the police and stated "Tom Pretends Eagle just almost side-swiped me. I think he is drunk."[336] Police located Pretends Eagle's car and observed him, during which time there were neither traffic violations nor erratic driving.[337] Nevertheless, the tribal police stopped and arrested him for driving under the influence.[338] The issue in *Pretends*

331. *See* Rosen, *Outer Limits*, *supra* note 7, at 1098-1103 (explaining why this would be problematic).

332. For a full discussion of what this might entail, see *id.* at 1093-97.

333. *See, e.g.*, S. Ute Tribe v. Price, 18 Indian L. Rep. 6117, 6119 (S. Ute Tribal Ct. 1991) (driving car backwards on major road provides probable cause for a stop); S. Ute Tribe v. Williams, 18 Indian L. Rep. 6049, 6051 (S. Ute Tribal Ct. 1990) (holding that slow and erratic driving provides probable cause to initially stop a vehicle).

334. *See supra* Part III.C.

335. 24 Indian L. Rep. 6240 (Winnebago Tribal Ct. 1997).

336. *Id.* at 6240.

337. *Id.*

338. *Id.*

Eagle was whether this warrantless arrest satisfied the "reasonable cause" requirement that appeared in the Winnebago Criminal Procedure Code.[339] Although the tribal court recognized that federal constructions of reasonable cause were not binding,[340] it engaged in Stock Incorporation by "adopt[ing]" the definition of "probable cause" that appeared in Black's Law Dictionary.[341] Looking to the "facts and circumstances within an officers' knowledge" that might lead "a person of reasonable caution in the belief that an offense has been, is being, or will be committed," the tribal court found that the information provided to the tribal police "did not establish facts sufficient to show that the defendant was driving under the influence" but only that Pretends Eagle had almost sideswiped someone.[342] For this reason the tribal court also concluded that the police did not have authority to conduct a stop and frisk, pointing out that the tribal code "provides for a higher standard for a stop and frisk than the Supreme Court set out in *Terry v. Ohio*."[343]

The tribal courts typically engage in careful, rights-protecting applications of the search and seizure Standards. For example, in *Hopi Tribe v. Dawahoya*,[344] the court decided whether an anonymous tip, that the defendant was transporting an unknown quantity of alcohol in a truck heading on a particular road, gave police the "reasonable suspicion" necessary to justify an investigatory stop. Engaging in Stock Incorporation, the court answered in the negative, holding that the tip did not contain sufficient indicia of reliability that could be corroborated independently by the police and "lead to the inference that the informant had reliable access to inside information" because the only information that could be independently verified was the street on which the defendant was heading.[345] Similarly, in *In re D.N.*,[346] the tribal court held that although asking a student to empty his pockets and administering a pat-down search was reasonable, it was not reasonable for a teacher to reach under a student's underwear waistband. The *D.N.* court stated that a "search will be permissible only when the measures adopted in the search are reasonably related to the objectives of the search and are not excessively intrusive in light

339. *Id.*
340. *Id.* at 6241.
341. *Id.* at 6243.
342. *Id.*
343. *Id.* at 6244. The tribal court noted that *Terry* allows stop and frisk when a "police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot," *see id.* (quoting Terry v. Ohio, 392 U.S. 1, 30 (1967)), whereas the tribal ordinance requires the officer to have "probable cause." *Id.* This is arguably in tension with, though not flatly inconsistent with, the tribal court's earlier analysis, where it equated reasonable and probable cause. *Id.* at 6243.
344. 25 Indian L. Rep. 6107 (Hopi App. Ct. 1995).
345. *Id.*
346. 22 Indian L. Rep. 6071, 6072 (Hopi Child. Ct. 1995).

of the age and sex of the student and the nature of the infraction."[347] Finally, consider the case of *Randolph v. Hopi Tribe*.[348] In *Randolph*, the tribal appellate court reversed a conviction and clarified the burdens of proof and persuasion in suppression hearings by means of Fitted Incorporation.[349] The court canvassed the non-Indian case law, finding two general approaches, and then considered "which allocation of the burden of proof comports with Hopi public policy."[350] The court concluded that the prosecution bore the burden of proof by a preponderance of the evidence.[351]

Tribal courts have adopted federal doctrine by means of Incorporation more fully in search and seizure cases than any other area.[352] As a result, tribal search and seizure jurisprudence is completely familiar to anyone acquainted with federal criminal law. Familiar concepts such as "reasonable suspicion,"[353] "probable cause,"[354] "stop and frisk,"[355] and others can be found. There are several reasons why this does not undercut the importance of having tribal courts, rather than federal courts, interpreting search and seizure.[356] First, tribal courts sometimes conceptualize the Legal Test as being consistent with, and advancing, tribal culture. For example, after noting that federal decisions "are not binding upon this court," the *D.N.* court adopted the federal rule that a "school official may conduct a search of a student's person if the official has a reasonable suspicion that a crime has been committed or that the student is in the process of committing an offense."[357] The tribal court engaged in Fitted Incorporation, however, attributing the rule partly to the "Hopi tradition and the Hopi's strong belief in the extended family [because] a Hopi person who sends their child to school expects the school and its officials to act *in loco parentis*."[358] Conceptualizing the Legal Test as being consistent with tribal culture facilitates both assimilation of Anglo jurisprudence as well as cultural syncretism.

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347. *Id.* at 6071.
348. 26 Indian L. Rep. 6015 (Hopi App. Ct. 1997).
349. *Id.* at 6017-18.
350. *Id.* at 6017.
351. *Id.* at 6018.
352. *See, e.g.*, S. Ute Tribe v. Price, 18 Indian L. Rep. 6117 (S. Ute Tribal Ct. 1991) (similar); *In re* D.N., 22 Indian L. Rep. 6071 (Hopi Child. Ct. 1995); S. Ute Tribe v. Scott, 18 Indian L. Rep. 6105, 6106-07 (S. Ute Tribal Ct. 1991) (deciding two search and seizure issues by means of Incorporation; intoxication does not *per se* negate consent to a search, and roadside sobriety tests are not incident to lawful arrest).
353. *See e.g.*, Hopi Tribe v. Dawahoya, 25 Indian L. Rep. 6107, 6107 (Hopi App. Ct. 1995).
354. *See, e.g., D.N.*, 22 Indian L. Rep. at 6071.
355. Winnebago Tribe of Neb. v. Pretends Eagle, 24 Indian L. Rep. 6240, 6244 (Winnebago Tribal Ct. 1997).
356. *See supra* Part II.A.2.
357. *D.N.*, 22 Indian L. Rep. at 6071.
358. *Id.*

Second, tribal courts typically work hard to fit federal Standards they adopt to the tribal context, a task non-Indian courts may not be well suited to accomplish. In the *Kahe* case, for example, the tribal court took account of the Hopi concept of the "welfare check" in upholding an officer's stop as reasonable.[359] Similarly, in *Hopi Tribe v. Mahape*,[360] the court adopted the federal rule that driveways are only "semi-private" and that the reasonableness of a driveway search turned on the possessor's expectation of privacy and the officer's reasons for being on the driveway. Subsequently, the court found "the attitude of the Hopi people to be concerned about the safety and welfare of others" to be a relevant factor that justified upholding an officer's search of a vehicle containing human occupants that had been parked on a driveway for a long period of time during the winter.[361] In particular, the court noted that the cultural context of Hopi concern for others made the officer's attentiveness to a tribal member's "concern for the safety and welfare of her family and neighbors, and her authorization to check suspicious activity in the area" reasonable.[362] The holdings in the *Kahe* and *Mahape* cases constitute the greatest threat to Protection because they sanction the most expansive searches in all the search and seizure case law. These cases, however, likely would not strike many readers as constituting particularly Hard Cases.

With respect to the remedy when an unlawful search and seizure occurs, all the reported tribal court decisions have engaged in Incorporation and prescribed the exclusionary rule upon finding violations.[363] The *Pretends Eagle* court employed Fitted Incorporation, taking tribe-specific considerations into account when it adopted the exclusionary rule.[364] The court expressly stated that its holding was provisional because "neither party brought to the attention of the court any tribal customs or traditions which would help the court in interpreting the Constitution."[365] The court further explained that its holding "may be subject to review and revision by this Court in the future upon submission of evidence as to tribal traditions and customs."[366] The *D.N.* court, in a testimonial to deep assimilation, did not appear to appreciate that adopting the exclusionary rule involved a choice. The *D.N.* court viewed the

359. *See supra* Part IV.A.4.b.
360. 21 Indian L. Rep. 6138 (Hopi Tribal Ct. 1994).
361. *Id.* at 6139.
362. *Id.*
363. *See, e.g.*, *D.N.*, 22 Indian L. Rep. at 6072; Winnebago Tribe of Neb. v. Pretends Eagle, 24 Indian L. Rep. 6240, 6244 (Winnebago Tribal Ct. 1997).
364. *See Pretends Eagle*, 24 Indian L. Rep. at 6244.
365. *Id.*
366. *Id.*

exclusion of evidence obtained outside of a lawful search or seizure to be the natural outcome.[367]

It is interesting to consider why tribal courts have so fully adopted federal approaches in the search and seizure context instead of developing independent doctrines through Tailoring or Re-Standardizing as they have done with respect to so many other ICRA provisions. There are several possible explanations. First, the federal search and seizure case law employs particularly capacious broad standards such as "probable cause" and "reasonable suspicion" that allow themselves to be fitted to the Indian context. Second, the Anglo jurisprudence of search and seizure may fit particularly well with traditional tribal customs. Third,[368] it is possible that the federal doctrine approach is sound at the levels of Goal and Standard[369] and may even be largely transcultural.

d. *First Amendment Analogues*

There were fourteen reported tribal court decisions construing ICRA's First Amendment analogues of freedom of speech, the right to petition the government, assembly, and the free exercise of religion.[370] Although the sample is too small to make any definitive conclusions, some patterns do appear to emerge. Here, more than in any other ICRA provisions, the tribal courts have struck out on their own to develop ICRA doctrines that are independent of the federal case law. This may be the case because American First Amendment protections are more reflective of a particular Western, liberal tradition and both shape and reflect societal values more than any other constitutional provision. It also might be a product of the complexity of First Amendment law, particularly free speech, which makes recourse to the federal approach a time-consuming and difficult project. Despite these considerations, several cases make use of Incorporation, and when there is Adapted Adoption one still finds

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367. *See D.N.*, 22 Indian L. Rep. at 6072. In fact, the exclusionary rule is by no means the only logically plausible remedy. *See* Harold J. Krent, *How to Move Beyond the Exclusionary Rule: Structuring Judicial Response to Legislative Reform Efforts*, 26 Pepp. L. Rev. 855, 877 (1999); *see also* L. Timothy Perrin et. al., *If it's Broken, Fix it: Moving Beyond the Exclusionary Rule*, 83 Iowa L. Rev. 669, 736-55 (1999) (proposing numerous alternatives to the exclusionary rule).

368. Another reason is that search and seizures Legal Tests have been codified in many tribal ordinances or tribal constitutions. This is not really an independent explanation, however, insofar as it simply pushes the inquiry back one step, for the question still arises as to why tribal law has codified and adopted federal approaches.

369. This could be true even if Fourth Amendment doctrine is an incoherent "mess" at the more concrete level of Rulified Standard, as many commentators have argued. *See, e.g.*, Erik G. Luna, *Sovereignty and Suspicion*, 48 Duke L.J. 787, 787-88 (1999) (collecting commentators who concur that contemporary Fourth Amendment doctrine is a "mess").

370. ICRA does not have any provisions paralleling the First Amendment's Establishment clause.

that the core First Amendment values are assimilated, even if the Anglo values are refracted more sharply through the Indian cultural prism here than is the case with other ICRA provisions. Also present in this area are several cases in which tribal courts engaging in Tabula Rasa assert that a given circumstance violates the ICRA provision without making any effort to develop a rule. While perhaps jarring from the perspective of twentieth-century American constitutional law, such *ipse dixit* reasoning is characteristic of the common law development of rules that characterizes constitutional adjudication. In fact, such reasoning is characteristic of the first American Supreme Court cases that construed due process, free exercise, and the like.[371]

In *Chavez v. Tome*,[372] one of the seven cases concerning free speech, the trial court had held that a newspaper libeled an individual and then ordered that the newspaper print a retraction. Engaging in Stock Incorporation, the *Chavez* court reversed the retraction order due to the "right of the press to be free of governmental intervention."[373] Subsequently, the *Chavez* court held that "[t]he choice of material to be printed is a protected exercise of editorial control and judgment and the government is prevented from regulating this process. A responsible press is desirable, but it cannot be legislated by the Navajo Tribal Council or mandated by the Navajo courts."[374] The court further stated that although "[t]his does not mean that the press is free to print libelous material, because the government does have a legitimate interest in protecting an individual's good name,"[375] all a court can do is assess damages.

Gwin v. Bolman[376] is a fine example of laconic, *ipse dixit* reasoning in the context of Tabula Rasa. In *Gwin*, a petition had garnered sufficient signatures to trigger a so-called "recall election" to summon from office several school board members.[377] A tribal ordinance provided that other candidates could run in the recall election, but if the board members were to resign, the board could avoid the recall election by appointing replacements to serve out the unexpired terms.[378] The court concluded that the ordinance transformed the recall election into a *de facto* general election and that this "harms plaintiff's First Amendment rights."[379] Accordingly, the court enjoined the *de facto* general election and instead called for an election in which the voters would decide the sole question of whether

371. *See supra* note 60 and accompanying text.
372. 14 Indian L. Rep. 6029 (Navajo 1987).
373. *Id.* at 6032.
374. *Id.*
375. *Id.*
376. 25 Indian L. Rep. 6121 (Three Affiliated Tribes of Fort Berthold Reservation D. Ct. 1998).
377. *Id.* at 6122.
378. *See id.*
379. *Id.*

the board member should be recalled. Presumably, a concern that the ordinance burdened the board member's right to defend herself against the recall petition animated the court's ruling, a strong rights-protecting free speech principle. The court, however, did not provide reasoning for its conclusion or seek to generate a legal rule that would give guidance for future cases. In *Navajo Nation v. Crockett*,[380] another freedom of speech case, the issue was whether a tribal agency's "interest in promoting the efficiency of the public services it performs through its employees" outweighs the employees' free speech rights to "disclose demoralizing or disruptive" but true information about possible mismanagement and misconduct. The court held that the agency's interests did not outweigh the individuals' right to free speech.[381] In the course of making its ruling, however, the court, in dicta, provided very different rules governing employee dissatisfactions that were not matters of "public concern."[382] These rules subordinated the disgruntled employee's interests to the community's interest in encouraging negotiated solutions over litigation. The court did not cite to federal case law, but instead proceeded via Tabula Rasa.[383]

The issue presented in *Hopi Tribe v. Lonewolf Scott*,[384] was whether an ordinance prohibiting the damaging of public property interfered with free speech when applied to protesters who had unearthed part of the Hopi-Navajo fence. Engaging in Stock Incorporation, the court held that the defendants' acts "constituted civil disobedience that resulted in physical damage and was not... [protected speech and conduct because the] activities were not speech oriented, but were physical and allegedly destructive."[385]

Kavena v. Hamilton,[386] the only reported free exercise decision, is a fine example of Tabula Rasa being employed to help preserve distinctive tribal institutions. The Hopi Tribe's constitution provided that villages could alter their political organization by means of a village-wide referendum if twenty-five percent of the "voting members" of the village signed a petition. *Kavena* and a companion case[387] concerned a referendum in "traditional villages" where "Hopi religion and village organization... is virtually inseparable [and m]embership in a village is in part religious as well as civil." The advocates of change expressly hoped to break the linkage between village membership and religion.

380. 24 Indian L. Rep. 6027, 6029 (Navajo 1996).
381. *See id.*
382. *Id.*
383. *See supra* Part II.A.2.
384. 14 Indian L. Rep. 6001, 6005 (Hopi Tribal Ct. 1986).
385. *Id.* (citing to federal case law for the proposition).
386. 16 Indian L. Rep. 6061 (Hopi Tribal Ct. 1988).
387. Kavena v. Hopi Indian Tribal Ct., 16 Indian L. Rep. 6063 (Hopi App. Ct. 1989).

The specific question before the tribal court in *Kavena* was whether a petition containing two hundred sixty-nine valid signatures satisfied the twenty-five percent "voting members" requirement.[388] An official of the Federal Bureau of Indian Affairs, who under the Hopi constitution was responsible for "see[ing] that there [was] a fair vote," had determined the total number of voting members by counting the number of village residents who had voted in a previous tribal election. The tribal court found that this method of counting understated the number of voting members because "[m]any village members . . . do not reside in the village of their membership." Nonresidents could still qualify as members because "[v]illage membership in a [traditional] village . . . with the traditional Hopi organization, is a concept with much deeper meaning than mere physical presence or residence."[389] The court noted that membership "involves the maintenance of religious and cultural ties and relationships with the village and its ceremonies" such that village membership is "virtually inseparable" from the practice of their religion.[390] The court concluded that denying the franchise to non-resident members of traditional villages accordingly infringed non-residents' religious freedom.[391] The court then permanently enjoined the election because a proper computation proved that less than twenty-five percent of voting members, properly understood, had petitioned for a referendum.[392]

Only limited case law construing the rest of ICRA's First Amendment analogues exists, but these decisions have almost uniformly been rights-protecting. One court confronted a claim that a tribe's "one person/one caucus rule," which allowed tribal members to attend the caucus of only one candidate for tribal council, violated the "right of the people peaceably to assemble."[393] Engaging in Fitted Incorporation, the tribal court adopted the federal Legal Test and struck down the tribal rule.[394]

Several reported cases involved the right to petition for redress of grievances. The *Hudson v. Hoh Indian Tribe*[395] decision engaged in

388. *Id.*
389. *Id.* at 6065.
390. *Id.*
391. *Id.* at 6062.
392. *Id.* at 6065-66.
393. *Id.*
394. *See* Rave v. Reynolds, 23 Indian L. Rep. 6150, 6165-68 (Winnebago Sup. Ct. 1996).
395. 21 Indian L. Rep. 6045 (Hoh Ct. App. 1992). The *Hudson* case was unusual because it required interpretation of a tribal constitution that by its terms appeared to require that its provisions be construed no differently than its sister terms in the United States Constitution. *Id.* at 6045-46. The *Hudson* court accordingly sought to engage in Stock Incorporation, citing to federal precedent to identify the appropriate Legal Tests. *Id.* at 6046. In concluding that the right to petition "must be read as a limitation upon any sovereign immunity that the Hoh Tribe may possess," however,

Stock Incorporation by holding that the right to petition "extends to all departments of the government," including "access to the courts," and that the right to petition waived the tribe's sovereign immunity for wrongful termination actions. Similarly, in *Kowalski v. Elofson*,[396] the court held that although the right to petition for redress of grievances did not mandate judicial review of community council actions to remove council members, it did require the existence of an "appropriate forum" where grievances could be brought. Also, the *Southern Ute Public Housing Authority v. Pinnecoose*[397] court confronted the question of whether allowing counterclaims by governmental agencies for abuse of process unlawfully burdened the right to petition for redress of grievances.[398] The *Pinnecoose* court looked to federal and state decisions but Re-Standardized, synthesizing its own Legal Test from several approaches that had been taken by lower federal and state courts.[399] Interestingly, this appears to be a rare instance of Re-Standardizing not to create doctrine fitted to tribal needs but to create a better rule.

The one possible Hard Case in this area concerned freedom of expression. In *Brandon v. Tribal Council for the Confederated Tribes of the Grand Ronde Community of Oregon*,[400] the tribal court Re-Standardized and Tailored to uphold the suspension of a tribal councilman for making a vulgar statement to his cousin in violation of an ordinance prohibiting council members from using vulgar speech in public. The tribal court Re-Standardized from the federal case law allowing the regulation of obscenity and fighting words when it formulated free speech's applicable Legal Test as requiring a "valid and compelling reason . . . to ban certain expressions or conduct upon the part of its citizens."[401] The court then Tailored this test to the tribal context, concluding that:

> the tribe has the right to expect its councilmembers to conduct themselves in public with dignity and respect, and refrain from using words or phrases that a normal tribal member is privileged to use.

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the tribal court appeared to misconstrue the federal case law insofar as the right to petition has not meant the end of federal sovereign immunity. *Id.*; *see e.g.*, Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 260 (1999) (noting that "[a]bsent a waiver, sovereign immunity shields the Federal government and its agencies from suit" (citations omitted)).

396. 22 Indian L. Rep. 6007 (Lower Elwha Ct. App. 1993).

397. 18 Indian L. Rep. 6115 (S. Ute Tribal Ct. 1991).

398. *See id.*

399. *See id.* at 6117.

400. 18 Indian L. Rep. 6139 (Grand Ronde Tribal Ct. 1991).

401. *Id.* at 6141. The tribal court's formulation qualifies as Re-Standardizing because the federal Legal Test is not a compelling interest Standard, which would permit the creation of new exceptions, but instead treats fighting words and obscenity as fixed legal categories under which new factual scenarios must fall if they are to be immunized from ordinary First Amendment constraints. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83 (1992).

> [Moreover,] the type of language used by Mr. Brandon was arguably "fighting words" that were likely to create a violent or hostile situation .... Finally, the Grand Ronde Tribe has a vested interest in protecting its reputation throughout the community. It thus has a compelling reason to have enacted a provision in its tribal code prohibiting tribal members from involving themselves in actions or activities that may bring discredit or disrespect on the tribe.[402]

It is unlikely that a provision such as the tribe's would be found to fall within the "fighting words" exception under ordinary federal doctrine.[403] On the other hand, the *Brandon* court repeatedly stressed that "council members should be expected to conduct themselves at a higher level of restraint than other tribal members" and there is a well-established branch of free speech doctrine that provides relaxed standards for regulating the speech of government employees.[404] For example, the United States Supreme Court has upheld the Hatch Act's bar that prevents federal employees from participating in partisan political activities because such undertakings could "reasonably [be] deemed by Congress to interfere with the efficiency of the public service."[405] It could be argued that the Grand Ronde ordinance is analogous because maintaining respect for political leaders could be said to be a precondition to effective public service. In any event, a tribal court's conclusion does not violate Protection merely because it deviates from what would have been the likely outcome in federal court. If, and to what extent, *Brandon* implicates the values of Protection has to be determined based on a thick political theory. Allowing a valuable yet idiosyncratic community like Native Americans to deploy the type of limitation found in *Brandon* would not be problematic under a thick Rawlsian political theory because the ordinance implicates neither the exit right nor well-orderedness.[406]

e. *Sixth Amendment Analogues*

There were twenty-eight claims based on ICRA's Sixth Amendment analogues. Ten cases involved the right to a jury trial,

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402. *Brandon*, 18 Indian L. Rep. at 6141.

403. In fact, the Supreme Court "has not upheld a conviction on the basis of the fighting words doctrine since Chaplinsky," the case that created the doctrine. Geoffrey R. Stone, et al., The First Amendment 83 (1999).

404. *See, e.g.*, United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 550, 564 (1973) (noting that "the government has an interest in regulating the conduct and 'the speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general'" and going on to uphold law barring federal employees from engaging in plainly identifiable acts of political management and political campaigning (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968))).

405. *Id.*

406. *See* Rosen, *Outer Limits*, *supra* note 7, at 1093-1106.

nine cases addressed the right to counsel, six cases involved speedy trial claims, two cases construed the nature and cause of the accusation clause, and one case concerned the guarantee of compulsory process. The pattern of Adapted Adoption continues in these cases, although there are significant deviations in right to jury and counsel cases because ICRA's language departs from the Bill of Rights language by creating conditions precedent to the vesting of its rights. The tribal case law throughout the Sixth Amendment analogues is consistently protective of rights; there do not appear to be any Hard Cases here. Nor do any of the cases create externalities.

(i) Right To Jury Trial

Three cases presented threshold questions concerning the applicability of the ICRA jury right. In *Shippentower v. Confederated Tribes of the Umatilla Indian Reservation of Oregon*,[407] the issue was whether the jury right extends to civil matters. Relying on straightforward statutory interpretation—the ICRA provision grants the jury right only to persons "accused of an offense punishable by imprisonment"—the tribal court held in the negative. Similarly, in *Nisqually Indian Community v. J.S.K.*,[408] a tribal court engaged in Stock Incorporation and held that juvenile defendants who were in juvenile court proceedings for conduct that would be criminal for adults were not entitled to a jury trial, relying on federal Supreme Court precedent distinguishing the rehabilitative purposes of juvenile proceedings from the punitive purposes of criminal proceedings. Finally, in *Pueblo of Pojoaque v. Jagles*,[409] the tribal court concluded that an adult defendant accused of theft was not entitled to a jury trial. The court reasoned that because the tribe's limited resources precluded imprisonment even if the defendant were convicted, there was no jury right because the ICRA provision applies only to defendants accused of offenses that are "punishable by imprisonment." This might qualify as a Hard Case. On the one hand, the *Jagles* opinion fits the pattern of the practical over the hypertechnical; the case might not be problematic for the reasons previously discussed.[410] On the other hand, the *Jagles* court did not consider the possibility that "imprisonment" may be a statutory proxy for crimes with social consequences that are of sufficient magnitude to demand the jury guarantee. Under this view, the mere fact that the defendant could not have been imprisoned would not eliminate the importance of a jury trial. Even so, *Jagles* is not problematic under a

407. 20 Indian L. Rep. 6026 (Umatilla Tribal Ct. 1993).
408. 20 Indian L. Rep. 6049 (Nisqually Tribal Ct. 1986).
409. 24 Indian L. Rep. 6137 (Pojoaque Pueblo Tribal Ct. 1997).
410. *See supra* Part IV.B.4.a.

Rawlsian framework, for it implicates neither exit nor well-orderedness.

Another threshold question frequently litigated in the tribal cases is under what conditions the jury right can be waived. In contrast to the Sixth Amendment, the ICRA right to jury trial contains, by its terms, a condition precedent: the criminal defendant must make a "request" for a jury before the tribe's obligation of not "deny[ing]" the request is triggered.[411] But are there any conditions that must pertain for a defendant's failure to request a jury to be deemed permissible? Although it is not apparent from the language of the ICRA provision, all tribal courts presented with the question have concluded that there must be a knowing and voluntary waiver of ICRA's conditional jury right.

For example, in *Confederated Salish and Kootenai Tribes v. Peone*,[412] the court held that the "failure of the accused to make a request for a jury trial constitutes a valid waiver only when that failure to request a jury trial is made knowingly and intentionally, and the accused is aware that s/he [sic] is giving up his/her right to a trial by jury." Similarly, in *Laramie v. Colville Confederated Tribes*,[413] the tribal court struck down an ordinance that required parties who had requested a jury trial at the start of litigation to confirm ten days before trial their desire to have a jury.[414] The court gave credence to the tribe's concern that the "difficulties of bringing in jurors over long distances and the efficient administration of justice" required confirmation, but ultimately rejected it.[415] The court stated that "[w]hile we are sympathetic to the concerns of the tribe, the fundamental right of a criminal defendant to a trial by jury cannot be diluted because of administrative difficulties."[416] Illustrative of the rights-protecting character of this opinion is the tribal court's rejection of the tribe's argument that any burden on the right was cured by the defendant's option to move to continue the trial and then renew her demand for a jury trial, a procedural motion that both the tribe and the defendant agreed was "routinely granted." The tribal court accordingly reversed the defendant's nonjury conviction and remanded the case to the lower court for a jury trial.

411. 25 U.S.C. § 1302(10) (1994).

412. 16 Indian L. Rep. 6136, 6137 (Confederated Salish & Kootenai Tribal Ct. 1989).

413. 22 Indian L. Rep. 6072 (Colville Ct. App. 1995).

414. The court's reasoning technically cannot be analyzed under the model developed in Part II.A. because there is no constitutional analogue to the ICRA language it was construing. Nonetheless, the court's approach can be analogized to Stock Incorporation because it looked to federal case law concerning waiver in other constitutional contexts.

415. *Id.* at 6074.

416. *Id.*

Other tribal courts have more readily found waiver of the right to jury trial. For example, in *Squaxin Island Tribe v. Johns*,[417] the tribal court held that although the defendant had made a timely request for jury, he subsequently waived it by "knowingly and voluntarily failing to appear on two occasions without justification after assurances of appearance were made to the court." The court noted that "[a]rranging and preparing for the trial and summoning the jurors was done at considerable expense to the court, its staff, and the tribe" and that the defendant accordingly had "waived or forfeited his opportunity for a jury trial."[418] Similarly, in *Hummingbird v. Southern Ute Indian Tribe*,[419] the tribal appellate court acknowledged that the "right to a jury trial is a fundamental right" under ICRA, but noted that "in order to take advantage of this fundamental right certain procedures need to be followed." The appellate court upheld the lower court's determination that the defendant had waived her jury right because the defendant had been informed of the applicable procedures—a written jury request and payment of a $25 jury fee—but had not followed them.[420] While *Johns* and *Hummingbird* are less rights-protecting than *Laramie* and *Peone*, they probably do not qualify as Hard Cases. They both require that rights be knowingly waived; the noninevitability of such a requirement, and hence the significance in respect of the value of Protection that tribal courts have created waiver requirements, is underscored by the fact that the bulk of federal constitutional rights are waivable without a showing that the waiver was knowingly undertaken.[421] Furthermore, as the

417. 15 Indian L. Rep. 6010, 6011 (Sq. I. Tribal Ct. 1987).

418. The court also held that disallowing a jury trial under these circumstances did not violate due process. *See id.*

419. 19 Indian L. Rep. 6067, 6067 (S. W. Intertribal Ct. App. 1991).

420. It is worth noting that the *Hummingbird* court did not expressly hold that the procedures were compatible with ICRA; the appellant in *Hummingbird* does not appear to have argued that the procedures violated ICRA and the tribal court only upheld the trial court's finding that the procedures had not been followed.

One other case addressed the right to jury, but on due process grounds. The tribal court in *S. Ute Tribe v. Watts*, (S. Ute Tribal Ct. 1994), came to a conclusion almost flatly at odds with that of the *Laramie* and *Peone* courts. At issue in *Watts* was whether an ordinance that required parties to request a jury within ten days of entering their plea, subject to the pain of losing the right, violated due process. The tribal court found the ordinance to be an acceptable means of "protecting tribal governmental authority." One can only speculate as to whether the outcome would have been any different had the defendant's argument been cast in terms of the jury right rather than due process.

421. *See, e.g.*, Daigle v. Maine Med. Ctr., 14 F.3d 684, 687-88 (1st Cir. 1994) (refusing to consider constitutional claim that jury right was violated because plaintiff failed to raise it at the trial level; no showing that such waiver was knowing); Cohen v. President & Fellows of Harvard Coll., 729 F.2d 59, 60-61 (1st Cir. 1984) (rejecting assorted constitutional claims because they were not raised at trial). That the waiver of the Sixth Amendment jury right must be knowingly made, *see* Godinez v. Moran, 509 U.S. 389, 396-99 (1993), does not undercut the point made above in the text that the tribal courts' waiver requirements in respect of the ICRA provision was not

courts in both *Jones* and *Hummingbird* pointed out, the defendants had actual knowledge of the procedural requirements.

The final jury trail case meriting discussion, *Downey v. Bigman*[422] illustrates well the conceptualization of Anglo practices in Indian cultural terms, a phenomenon relevant to deep assimilation. The *Downey* court held that a judge's overturning of a jury's verdict violates the jury right except in narrow circumstances.[423] As discussed extensively above,[424] the court grounded its decision in tribal traditions of "participatory democracy." Conceptualizing juries as Anglo forms of tribal consensus-building and democracy is likely to facilitate the absorption of Anglo trial values because the novel Anglo procedure is characterized as a traditional Indian commitment. At the same time, such conceptualization allows the Anglo values to be reshaped in accordance with tribal values and needs, and accordingly invites cultural syncretism. *Downey* showcases this as well. The tribal court engaged in Re-Targeting, identifying community participation in decisionmaking as the jury right's Goal, and created a novel procedure that advanced this Goal—allowing juries to ask witnesses questions during trial.[425]

(ii) Right to Counsel

Two types of right to counsel claims appear in the tribal case law: waiver and ineffective assistance of counsel. With regard to the first, the tribal case law unanimously holds that the right to counsel can be waived. These cases are consistent with the language of ICRA, which prohibits tribes only from "deny[ing] to any person in a criminal proceeding the right . . . *at his own expense* to have the assistance of counsel for his defense."[426] As with the right to jury trial, however, tribal courts have required that the right be knowingly waived. Four of the nine reported cases presented the issue of whether a particular defendant had knowingly waived the right to counsel. In two cases where tribal courts found waiver, there was explicit evidence that the defendant had been "fully informed" of his right to assistance of counsel but that he "willingly chose" to represent himself.[427] In two

inevitable.

422. 22 Indian L. Rep. 6145 (Navajo 1995).

423. Namely, where "the evidence is insufficient, as a matter of law, to support the finding . . . or when the jury is confused." *Id.* at 6146-47; *see also supra* notes 74-76 and accompanying text (discussing the *Downey* decision).

424. *See supra* notes 168-73 and accompanying text.

425. *Downey*, 22 Indian L. Rep. at 6146.

426. 25 U.S.C. § 1302(6) (1994) (emphasis added).

427. Lummi Indian Nation v. Solomon, 21 Indian L. Rep. 6085, 6085 (Lummi Ct. App. 1992); *see also* Hoh Idaho Tribe v. Penn, 15 Indian L. Rep. 6029, 6030 (Hoh Ct. App. 1988) ("The defendant was fully aware and understood that he had the right to be represented by a lawyer or spokesperson at his own expense. After being given an opportunity to request a continuance to consult with a lawyer or spokesperson before

other cases the defendants' insufficient effort to obtain counsel was the basis for finding waiver. One defendant had been informed of his right to counsel but "made no effort to contact spokespersons who appear before the Suquamish Tribal Court to assist indigent tribal members"[428] over a period of fifteen months. In the fourth and final case in which waiver was found, the defendant "was advised at arraignment of her right to counsel throughout the proceedings but failed to exercise that right until a few days before trial," eighteen months after being informed of the right to counsel.[429]

All three cases in which the tribal courts found that defendants had not made informed waivers of their right to counsel occurred in the Hopi courts. This is due to the extensive requirements that have been judicially created in Hopi jurisprudence to ensure "knowing[] and intelligent[]" waiver. The waiver requirements were first articulated in the case of *Hopi Tribe v. Consolidated Cases of Emerson AMI*,[430] which Tailored federal case law to the Hopi context. After noting that the right to counsel is a "fundamental right[]" because it "protect[s] the defendant against the power of the Tribe," the court then proceeded to construe a Hopi ordinance that required "knowing" waiver of counsel. Because the term "knowing" was not defined in the ordinance, the court looked to federal and state case law, noting that "[a]lthough federal law is not necessarily binding in Hopi courts, a review of federal law will provide an example of a standard that this Court can modify to meet the needs of the Hopi Tribe."[431]

The tribal court in *AMI* ultimately held that defendants "must have knowledge about the dangers associated with proceeding *pro se*[,] . . . the charges against them, the range of allowable punishment, possible defenses to the charges, and factors in mitigation of the charge." As is true of the due process cases that seek to protect the indigent,[432] the *AMI* court charged the trial judge with the duty of communicating this information to defendants. The court also required the judge to consider the defendant's "education and mental condition." The *AMI* court then analyzed a "legal rights form" that was given to all defendants to inform them of their rights, and mandated many changes. The court also held that a defendant's signature on the form is not sufficient to constitute a waiver and that the judge still must make an "active inquiry" because many defendants have limited command of English, due to the "novel, frightening and stressful situation" of having been arrested that might further compromise

pleading to the charge, the defendant chose not to . . . .").

428. Suquamish Indian Tribe, v. Mills, Sr., 21 Indian L. Rep. 6053, 6054 (Suquamish Ct. App. 1991).

429. Lummi Indian Tribe v. Edwards, 16 Indian L. Rep. 6005, 6008 (Lummi Ct. App. 1988).

430. 25 Indian L. Rep. 6163, 6164-66 (Hopi App. Ct. 1996).

431. *Id.* at 6164.

432. *See supra* notes 262-71 and accompanying text.

comprehension. The *AMI* court found this to be necessary because the form provides so much information it is "probably overwhelming to most defendants" and because "[m]any defendants may be too embarrassed or frightened to admit that they do not understand something."[433] Under these exacting standards for finding waiver, the *AMI* court itself reversed three convictions,[434] and two subsequent cases each reversed one additional conviction for invalid waiver of the right to counsel.[435]

None of the seven reported decisions concerning waiver qualifies as a Hard Case. Though the Hopi requirements are the most stringent, the less formalized approaches taken by the five courts that found valid waivers show no indications of being problematic. Finally, the fact that *all* tribal courts have some form of a knowing waiver requirement is a testimonial to their having taken the right to counsel seriously because ICRA does not expressly prescribe such a requirement and many United States constitutional rights may be unknowingly waived.[436]

Turning to the second type of right to counsel claim found in the tribal case law, two reported cases rejected claims of ineffective assistance of counsel, and neither is a Hard Case. The tribal court's analysis in *Navajo Nation v. MacDonald, Sr.*[437] is a fine example of the jurisprudential syncretism found in ICRA case law. The decision began by conceptualizing tribal customs in Anglo terms, stating that the "Navajo common law" includes the "right to effective assistance of counsel." The court then engaged in Fitted Incorporation, adopting the federal approach but looking to tribal custom to guide its application.[438] The court concluded that the defendant "received some very aggressive and competent representation" and that counsel "spoke for [defendant] wisely, and with knowledge, consistent with a traditional Navajo 'talking things out' session."[439] The second ineffective assistance of counsel case cited to the *MacDonald, Sr.* opinion for the proposition that the federal case law provided the applicable rules and determined that the defendant had received an

433. *AMI*, 25 Indian L. Rep. at 6165.

434. *Id.* at 6167-68.

435. *See* Harvey v. Hopi Tribe, 25 Indian L. Rep. 6212 (Hopi App. Ct. 1997); Poleahla v. Hopi Tribe, 25 Indian L. Rep. 6224 (Hopi App. Ct. 1997).

436. *See supra* notes 426-35 and accompanying text.

437. 19 Indian L. Rep. 6053 (Navajo 1991).

438. *See id.* at 6055 ("The traditional Navajo 'trial' involved affected individuals 'talking' about the offense and offender to resolve the problem. The alleged offender had the right to have someone speak for him. The effectiveness of a speaker (and there could be more than one) was measured by what the speaker said. If the speaker spoke wisely and with knowledge while persuading others in their search for consensus, that indicated effectiveness. If the speaker hesitated, was unsure, or failed to move the others, that person was not a good speaker and thus was ineffective." (citations omitted)).

439. *Id.* at 6056.

"excellent defense" in light of the briefs filed with the court and the quality of the legal theories that the defendant had propounded.[440]

(iii) Speedy Trial

Six cases raised speedy trial claims. All the cases adopted the federal Standard, under which courts are to look at the length of delay, reason for delay, whether and when defendant asserted his speedy trial right, and prejudice in determining if there has been a speedy trial violation.[441] One tribal appellate court remanded the case back to the trial court for a determination of whether the defendant's speedy trial right had been violated.[442] Another reported case clarified the point in criminal procedure at which the clock for speedy trial purposes begins, and approved of a tribal ordinance that provided that no delay of less than six months could be considered unreasonable for purposes of the speedy trial right.[443]

Four cases found that the speedy trial right had not been violated,[444] and in none of the cases do the facts suggest that the value of Protection was compromised. The defendants did not allege prejudice by virtue of the delays in any of the cases.[445] In two cases the delay had been caused largely or exclusively by the defendant.[446] In the third case, the defendant appeared to have behaved strategically, asserting his speedy trial objection only three working days prior to a trial that had been scheduled six weeks before and relying on the theory that the re-scheduled trial, which was due to occur ninety-one days after his arraignment, violated his rights because a Washington state court rule requires that no more than ninety days could elapse between arraignment and trial.[447] In the fourth case, the delay of six

440. Navajo Nation v. MacDonald, Jr., 19 Indian L. Rep. 6079, 6082 (Navajo 1992).

441. *See* Barker v. Wingo, 407 U.S. 514, 530 (1972).

442. *See* Sisseton-Wahpeton Dakota Nation v. Cloud, 21 Indian L. Rep. 6115, 6116-18 (N. Plains Intertribal Ct. App. 1994).

443. Cheyenne River Sioux Tribe v. Cook, 22 Indian L. Rep. 6037, 6037 (Cheyenne River Sioux Ct. App. 1995).

444. Komalestewa v. Hopi Tribe, 25 Indian L. Rep. 6213, 6214-15 (Hopi App. Ct. 1996); Stepetin v. Nisqually Indian Cmty., 20 Indian L. Rep. 6049, 6050 (Nisqually Ct. App. 1993); *MacDonald, Jr.*, 19 Indian L. Rep. at 6083 (Navajo 1992); Lummi Indian Tribe v. Edwards, 16 Indian L. Rep. 6005, 6007 (Lummi Ct. App. 1988).

445. *Komalestewa*, 25 Indian L. Rep. at 6215 ("Appellant does not allege any prejudice caused him by the delay in prosecution"); *Stepetin*, 20 Indian L. Rep. at 6050 ("[N]o prejudice occurred to the defendant."); *MacDonald, Jr.*, 19 Indian L. Rep. at 6083 ("[T]here is no indication that evidence was lost, memories were dimmed, defense witnesses disappeared or the defense was impaired.").

446. *Edwards*, 16 Indian L. Rep. at 6007 (noting that the defendant caused the eighteen month gap between arraignment and trial by twice requesting continuances and then failing to appear at trial); *Komalestewa*, 25 Indian L. Rep. at 6215 (stating that three 2 month delays were attributable to appellant's "own requests for delays and stipulations to continuances" and five-weeks of the delay was attributable to the government).

447. *Stepetin*, 20 Indian L. Rep. at 6050.

and one half months between arraignment and trial was due to the complexity of the case, which involved twenty-three counts of conspiracy, aiding and abetting, bribery, and violations of the Navajo Ethics in Government Act brought against a former Navajo council member.[448]

The speedy trial case law demonstrates the tribal courts' readiness to consult federal case law in the absence of definite tribal customs. For example, in *Komalestewa v. Hopi Tribe*,[449] the tribal court engaged in Fitted Incorporation and conceptualized the speedy trial right within tribal terms in a manner that justified looking to federal case law for guidance, stating that "Hopi custom speaks to fairness, but it does not provide specific guidance for defining when the right to a speedy trial has been violated. Therefore, we will consider foreign law and apply it to the extent it is consistent with our customs, traditions and culture."[450] Identifying the speedy trial right as being part of the tribe's cultural ethos of fairness is probably a fast track toward assimilation of the Anglo value. Similarly, in *Sisseton-Wahpeton Dakota Nation v. Cloud*,[451] the tribal court was unable to locate tribal custom bearing on the right to a speedy trial and determined that "this court [therefore] is permitted to look at other decisions that define and clarify what speedy trial is." The court identified four factors looked to by federal courts and remanded the case back to the trial judge.

(iv) Nature and Cause of Accusation

Two cases have construed ICRA's nature and cause of accusation clause. In *Walker River Paiute Tribe v. Jake*,[452] the tribal court held that the requirements of ICRA's nature and cause of accusation clause are not waivable and that all criminal complaints must contain this information. The *Jake* court employed Tabula Rasa, most likely because it viewed the legal question as having a very simple answer,[453] and dismissed the criminal complaint. In *Hopi Tribe v. Consolidated Cases of Emerson AMI*,[454] the tribal court employed Fitted Incorporation in its conclusion that the nature and cause of accusation clause requires a knowing, intelligent, and voluntary guilty plea.

448. *MacDonald, Jr.*, 19 Indian L. Rep. at 6079, 6083.
449. 25 Indian L. Rep. 6213, 6214-15 (Hopi App. Ct. 1996).
450. *Id.* at 6214.
451. 21 Indian L. Rep. 6115, 6116 (N. Plains Intertribal Ct. App. 1994).
452. 23 Indian L. Rep. 6204, 6207 (Walker River Tribal Ct. 1996).
453. This is suggested by the *Jake* court's one sentence analysis of the question ("This court specifically rejects any concept or notion that a criminal complaint passes muster even though the information required by . . . the ICRA is omitted.") and the fact that elsewhere in the opinion the court looked to federal law to construe other ICRA provisions. *See id.* at 6205-06.
454. 25 Indian L. Rep. 6163, 6166 (Hopi App. Ct. 1996).

(v) Compulsory Process

The one reported case applying ICRA's guarantee of compulsory process was decided in favor of the complaining citizen. The defendant in *Sisseton-Wahpeton Sioux Tribe v. Seaboy*[455] had been arraigned in court on May 18, 1988, and his trial was set three weeks later for June 8. Two days before trial, Seaboy applied for, and was granted, a continuance. No new trial date was set. At the end of August, Seaboy was informed that his trial would take place in four days. After Seaboy's conviction for theft, the tribal appellate court reversed on the ground that only four days' notice of the trial date deprived him of the right "to [have] compulsory process for obtaining witnesses [in his favor]."[456] In a sophisticated analysis, the tribal court deployed Tabula Rasa and reasoned analogically from the notice for trials required under federal civil rules.

f. *Fifth Amendment Analogues (excluding due process)*

There were fifteen reported decisions construing ICRA's guarantees against double jeopardy, self-incrimination, and uncompensated takings. The cases were uniformly rights-protecting; there are no Hard Cases here.

(i) Self-Incrimination

Five of the eight reported cases addressing the right against self-incrimination found violations or possible violations of the right. Nearly all reported cases deployed either Stock or Fitted Incorporation. As is the case with the right to jury and counsel, two of the cases concerned interpretation of tribal ordinances that either mirrored the ICRA provision or incorporated more detailed doctrinal formulations found in federal case law.[457]

The right against self-incrimination has been assiduously guarded by the tribal courts. For example, in *MacDonald v. Navajo Nation ex*

455. 17 Indian L. Rep. 6027 (Intertribal Ct. App. 1989) (Gillette, J., dissenting).

456. *Id.* at 6028. In an interesting show of judicial restraint, the tribal court refused to "legislate to the Sisseton-Wahpeton Tribal Council as to the minimum amount amount [sic] of time that is necessary to notify a defendant as to a trial date" but suggested that criminal defendants ought to have at least as much time as civil defendants. *Id.*

457. *See* S. Ute Tribe v. Lansing, 19 Indian L. Rep. 6091, 6092 (S. Ute Tribal Ct. 1992) (ordinance required police to inform person of rights "[b]efore any person who is in custody is questioned or in any manner interrogated concerning any possible criminal activity committed by that person" (citations ommitted)); Lower Elwha Klallam Indian Tribe v. Bolstrom, 19 Indian L. Rep. 6026, 6027 (Lower Elwha Ct. App. 1991) (noting that the ordinance "is essentially a statutory list of the decision of *Miranda v. Arizona*, 384 U.S. 436 (1966)").

rel Rothstein,[458] the appellate court raised self-incrimination concerns *sua sponte*, observing that although

> [t]his court will not normally address errors which are not raised by an appellant, . . . [w]here it is not clear that an individual has made a knowing and intelligent choice between claiming or waiving a fundamental privilege, and where this court sees errors to which no exception has been taken and they would "seriously affect the fairness, integrity or public reputation of judicial proceedings," we will act.

The appellate court then analyzed a lower court order that defendant produce personal diaries and other personal documents that did not qualify as business records. The tribal appellate court directed the trial court to conduct a hearing to ensure that the requested documents did not run afoul of the self-incrimination Standards that the appellate court adopted from the Supreme Court via Stock Incorporation.[459]

Tribal court sensitivity to the right against self-incrimination is also well illustrated by the case of *Hopi Tribe v. Consolidated Cases of Emerson AMI.*[460] The tribal court in *AMI* explained at length why the right against self-incrimination is a "fundamental right" of defendants. The court stated that it

> protect[s] the defendant against the power of the Tribe . . . . It forces the Tribe to prove the case against the defendant and not coerce a guilty plea from an innocent defendant. When a defendant enters a guilty plea, he waives many of his other rights including the right to a trial, the right to confront witnesses against him, and the right to have his own witnesses testify. This reduces the burden on the Tribe and makes it much easier for the Tribe to impose punishments.[461]

This may be a Tabula Rasa interpretation of the right, as the court did not cite to federal or state case law discussing the right against self-incrimination, though it did look to federal case law to clarify other ICRA provisions during its opinion. On the other hand, this formulation is sufficiently similar to the federal understanding that the decision more likely is an example of deep assimilation because the values were sufficiently obvious to the court as not to require citation.[462] Relying also on due process, the *AMI* court ultimately

458. 18 Indian L. Rep. 6003, 6007 (Navajo 1990) (quoting Johnson v. United States, 318 U.S. 189, 198, 200 (1942)).

459. *See id.* at 6007-08. In a subsequent case the same court engaged in Fitted Incorporation, explaining that the right against self-incrimination is identical to a longstanding tribal custom. *See* Navajo Nation v. MacDonald, Jr., 19 Indian L. Rep. 6079, 6084 (Navajo 1992).

460. 25 Indian L. Rep. 6163 (Hopi App. Ct. 1996).

461. *Id.* at 6164.

462. *See supra* Part IV.B.3.

reversed a defendant's guilty plea, and imposed a set of requirements on trial judges designed to ensure that defendants knowingly and voluntarily plead guilty. In yet another case deploying Fitted Incorporation, the *MacDonald, Jr.* court held that the trial court erred and directed it to hold a hearing at which the prosecution would bear the burden of showing that its evidence was not based on, nor derived from, immunized testimony the defendant had given before the United States Senate.[463]

Two of the tribal courts exhibited assimilation when they conceptualized the right against self-incrimination as reflecting tribal values. After explaining the core of the "fundamental" right against self-incrimination—that "an individual must not give information to be used for his or her own punishment unless there is a knowing and voluntary decision to do so"—the tribal court in *MacDonald, Jr.*[464] explained:

> [t]his is also a Navajo principle. Navajo common law rejects coercion, including coercing people to talk. Others may "talk" about a Navajo, but that does not mean coercion can be used to make that person admit guilt or the facts leading to a conclusion of guilt. Navajos often admit guilt, because honesty is another high value, but even after admitting guilt, defendants in Navajo courts are reluctant to speak.[465]

Similarly, in *Lower Elwha Klallam Indian Tribe v. Bolstrom*,[466] the tribal court adopted the exclusionary rule as the remedy for violations of the right against self-incrimination, justifying it on the basis of tribal values: "[w]hile there is no Lower Elwha Klallam statutory or case law (this being a case of first impression) prescribing a remedy for failing to give *Miranda* rights in a timely fashion, this court finds that the exclusionary rule conforms to the spirit of fundamental fairness inherent in Lower Elwha Klallam law."[467]

None of the three decisions finding no violation of the right against self-incrimination appears to be a Hard Case. One case found no violation because neither of the defendants had made any statements to the officer and, accordingly, no harm resulted from the officer's failure to advise defendants of their right to remain silent.[468] In the second case, the defendant had been charged with fishing in restricted waters. The tribal court carefully canvassed federal and state law and engaged in Stock Incorporation when it concluded that the right against self-incrimination does not apply to noncriminal

463. *MacDonald, Jr.*, 19 Indian L. Rep. at 6084.
464. *Id.*
465. *Id.*
466. 19 Indian L. Rep. 6026 (Lower Elwha Ct. App. 1991).
467. *Id.* at 6027.
468. *Id.*

proceedings.[469] The last case employed Stock Incorporation to define what constitutes "in custody," and found no custody when the police asked the defendant questions at the scene of an automobile accident and in a hospital emergency room.[470]

(ii) Double Jeopardy

There were four cases in which double jeopardy was an issue. All of the reported double jeopardy cases were decided in favor of the defendants, and the cases were at least as protective of double jeopardy rights as is the federal case law. Three tribal courts engaged in Fitted or Stock Incorporation. In an opinion reflecting assimilation, one court utilized the concept of double jeopardy to flesh out the meaning of a reasonableness inquiry in the context of administrative law. There are no Hard Cases here, nor do there appear to be any externalities.

Three of the cases presented the question of whether the double jeopardy protection precludes the prosecution from appealing an acquittal. All answered affirmatively. Deploying Stock Incorporation, one of the three cases concerned a tribe's attempt to prosecute defendants under a tribal regulation that was distinct from the regulation the defendant had been tried for violating in a prior trial, but whose elements to be proven were "identical under the facts of this case" to what the tribe unsuccessfully had tried to prove in the earlier prosecution.[471] Another tribal appellate court determined *sua sponte* that the double jeopardy provision barred the prosecution from appealing the trial court's interpretation of the tribal ordinance after the defendant had been acquitted.[472] Although the court did not cite to any case law, the legal test it used is identical to the federal approach, suggesting that the case is an example of deep assimilation and Incorporation rather than Tabula Rasa. In the third case, *Hopi Tribe v. Huma*,[473] the trial judge had ruled *sua sponte* after a full trial that a police officer did not have an articulable suspicion of wrongdoing prior to making a stop and consequently acquitted the defendant. The prosecution appealed, arguing *inter alia* that the trial court did not have the power to ignore evidence to which the defendant had not objected. The tribal appellate court relied on Fitted Incorporation and dismissed the appeal on the ground that it violated double jeopardy.

469. Chippewa-Ottawa Tribes v. Payment, Jr., 18 Indian L. Rep. 6141, 6141 (Chippewa-Ottawa Conservation Ct. 1991).

470. S. Ute Tribe v. Lansing, 19 Indian L. Rep. 6091 (S. Ute Tribal Ct. 1992).

471. Lummi Indian Tribe v. Kinley, 19 Indian L. Rep. 6027, 6029 (Lummi Ct. App. 1991).

472. Winnebago Tribe of Neb. v. Bigfire, 25 Indian L. Rep. 6229, 6234 (Winnebago Sup. Ct. 1998).

473. 25 Indian L. Rep. 6108 (Hopi App. Ct. 1995).

The *Huma* case showcases tribal openness to embracing admittedly foreign jurisprudential values that the tribal courts predict will have salubrious effects on tribal life. The court noted that double jeopardy "is an elemental principle of the United States criminal law" and acknowledged that the tribe itself had neither "created a provision for the Tribe to appeal an acquittal [n]or expressly rejected the doctrine."[474] Canvassing the purposes behind double jeopardy that have been identified in federal case law, the tribal court concluded that double jeopardy "serves goals that will protect the Hopi people and increase the Hopi confidence in the courts."[475] In response to the prosecutor's argument that "if the trial court has neglected its duty, it certainly cannot hold such failure against the Tribe," the appellate court responded "[i]f, through error, the defendant is found not guilty, it is the Tribe which must bear the burden. In no circumstances can a failure of the courts or prosecution be held against the defendant."[476] It is interesting to note that the *Huma* rule is stricter than the federal rule, because federal prosecutions frequently follow bungled state prosecutions even where the second demands proof of the same elements required in the first. This is permissible because proscribed activities frequently are governed by both state and federal law, and double jeopardy does not preclude federal prosecution after a failed state prosecution, or the converse, even if the second prosecution demands proof of the very elements required in the first trial.[477]

In the final case meriting discussion, *Rave, Sr., v. Ho-Chunk Nation Gaming Commission*, a tribal administrative agency had suspended Mr. Rave's gaming license for a period of one year on the basis of an alleged noncriminal violation. Rave appealed, and a tribal court found that the agency had violated its own procedures and, accordingly, ordered the agency to correct its errors and award Mr. Rave relief. On remand, the agency denied Rave any relief and *sua sponte* levied a new penalty without providing him notice or hearing. Rave appealed again. Noting that "[i]t is a well-settled tenet of administrative law that agency decision must prove reasonable under the circumstances," the tribal appellate court concluded that the agency's action was "without foundation in law," "arbitrary," "capricious," and an "abuse of discretion." The court further stated that "[i]t is contrary to law. *This is the administrative equivalent of double jeopardy or to be twice punished for the same transgression.*"[478] This case is probably best read as an importation of double jeopardy

474. *Id.*
475. *Id.*
476. *Id.*
477. *See* Abbate v. United States, 359 U.S. 187 (1959) (holding that state prosecution does not bar subsequent federal one); Bartkus v. Ill., 359 U.S. 121 (1959) (holding that federal prosecution does not bar subsequent state prosecution).
478. Rave, Sr., v. Ho-Chunk Nation Gaming Comm'n, 25 Indian L. Rep. 6042, 6044 (Ho-Chunk Nation Tribal Ct. 1997) (emphasis added).

concepts in the service of defining "reasonableness," illustrating deep tribal assimilation of Anglo jurisprudential values because the court equated double jeopardy with fundamental concepts of reasonableness and fairness.[479]

(iii) Uncompensated Takings

Three reported decisions concerned the guarantee against uncompensated takings. In *Kanzleiter v. Colville Indian Housing Authority*,[480] a tribal court engaged in Tabula Rasa interpretation in holding that the tribal housing authority's removal of "an abandoned vehicle hulk" that had not been moved for three years and that the authority deemed to be a "danger to inquisitive children, and an eyesore to the community" was a taking for public use that accordingly required compensation. In the two other decisions, tribal courts engaged in Fitted Incorporation and held that the appointment of counsel to represent indigents is not an uncompensated taking because the practice of law is a privilege that can be conditioned on the performance of *pro bono* representation.[481]

g. *Other Miscellaneous ICRA Rights*

There also were several reported cases construing and applying ICRA's protections against cruel and unusual punishment, bills of attainders, and ex post facto laws. There do not appear to be any Hard Cases. Nor do the cases impose externalities.

(i) Cruel and Unusual Punishment

There have been five reported decisions based on ICRA's ban against cruel and unusual punishment. Three cases upheld sentences against cruel and unusual punishment challenges. For example, in *Colville Confederated Tribes v. Sam*,[482] the tribal court engaged in Objective Incorporation by citing to an earlier tribal court decision that had fully adopted the federal standard that cruel and unusual punishment is violated by a punishment "so arbitrary and shocking to the sense of justice." The court also relied on the federal rule that the

479. Alternatively, the case could be understood as a Re-Targeting of double jeopardy insofar as it applied the protection outside the criminal context. *See* Helvering v. Mitchell, 303 U.S. 391 (1938) (applying double jeopardy only to criminal assessments).

480. 25 Indian L. Rep. 6181, 6183 (Colville Tribal Ct. 1998).

481. Boos v. Yazzie, 17 Indian L. Rep. 6115 (Navajo 1990); Navajo Nation v. MacDonald, Sr., 17 Indian L. Rep. 6124 (Navajo 1990). A takings claim was raised in one other case. *See* St. Regis Mohawk Tribe v. Basil Cook Enters., 23 Indian L. Rep. 6172 (St. Regis Tribal Ct. 1996). The tribal court did not address the merits of a takings claim because the tribe had not waived its sovereign immunity. *Id.* at 6174.

482. 21 Indian L. Rep. 6040 (Colville Ct. App. 1994).

trial court's sentencing will be overturned only for abuse of discretion; the tribal appellate court upheld defendants' sentence of 720 days for multiple offenses of driving while intoxicated in light of the defendant's "lengthy criminal history, failed attempts at rehabilitation" and the fact that the sentence fell far short of the statutory maximum.[483] In *Navajo Nation v. MacDonald, Sr.*,[484] the tribal appellate court employed Tailoring when it adjudged the magnitude of the offense by reference to tribal values. The defendant was a former Chairman of the Navajo Nation who had been convicted of accepting bribes while in public office. Upholding a sentence of 2160 days imprisonment and 1800 days of labor pursuant to the applicable tribal ordinances, the appellate court explained that "[o]fficial corruption in public office is a serious offense, because it robs the Navajo people of their property. Even more seriously, using Navajo culture, it robs the Navajo people of their dignity."[485] The court went on to note that "corruption in public office through bribes, kickbacks, and violations of ethical standards results in poor goods or services, . . . favoritism to non-Navajos, and a host of other injuries to the public good."[486] In conclusion, the court stated that the parties who paid the bribes were non-Navajos, and "[w]e are not blind to past exploitations of the Navajo people, and the Navajo Nation Council was not blind to them when it enacted both a revised criminal code and an ethics code."[487] In a subsequent case the Navajo Supreme Court relied on *MacDonald, Sr.* to uphold a similar sentence against another defendant in the same public corruption case.[488]

In *In re A.W.*,[489] the court held that the ban against cruel and unusual punishment requires that a juvenile detention area "be provided with a padded area to lie on, a blanket, and food to eat. . . ."[490] The court accordingly ordered that the detention center be closed until it was in compliance with the court's understanding of what the ban on cruel and unusual punishment required. Similarly, in *McDonald, Jr. v. Colville Confederated Tribes*,[491] the tribal court ordered the closure of a tribal jail because it had an inadequate ventilation system, faulty and outdated electrical system, and the conditions of the jail presented a danger to the health and safety of the inmates.

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483. *Id.* at 6043.
484. 19 Indian L. Rep. 6053 (Navajo 1991).
485. *Id.* at 6059.
486. *Id.*
487. *Id.* at 6060.
488. Navajo Nation v. MacDonald, Jr., 19 Indian L. Rep. 6079, 6084 (Navajo 1992).
489. 15 Indian L. Rep. 6041 (Navajo 1988).
490. *Id.* at 6042.
491. 17 Indian L. Rep. 6030 (Colville Tribal Ct. 1990). Although the tribal court did not identify any legal provisions in the course of its laconic opinion, the source of its authority presumably was ICRA's ban on cruel and unusual punishment.

(ii) Bills of Attainder and Ex Post Facto Laws

Five reported cases addressed claims that legislative acts constituted either bills of attainder or ex post facto laws, both of which are prohibited under ICRA.[492] The government prevailed in all five cases. Two cases decided bill of attainder claims. In *In re Certified Question II: Navajo Nation v. MacDonald*,[493] the issue was whether the tribal council's placement of a tribal leader on an administrative leave pending the results of a investigation into possible public corruption qualified as a prohibited bill of attainder. After noting that "[a] bill of attainder is apparently unknown to traditional Navajo culture," the tribal appellate court engaged in Stock Incorporation.[494] The court then directed the trial court to apply the Standard to the administrative leave, but made certain to point out that the trial court should Tailor the Legal Test's Standard to the tribal context. The court required that in determining whether the leave constituted a "punishment," the trial court must consider not only "what historically has been regarded as punishment for purposes of bills of attainder and bills of pains under the law of England and the United States" but also "what historically has been regarded as punishment under Navajo common law."[495] In *MacDonald, Sr. v. Redhouse*,[496] a later appeal in the same case, the appellant argued that amendments to the Navajo election statutes that disqualified from office individuals convicted of crimes of corruption in public office constituted a bill of attainder. The tribal appellate court once again engaged in Stock Incorporation and dismissed the appellant's arguments. The court utilized one of the Legal Tests under federal law for identifying a bill of attainder when it took judicial notice of the fact that other possible candidates for public office would be disqualified under the amendments, and then concluded that the amendments did not "target" the appellant.

Although none of the three cases deciding ex post facto claims granted relief, none qualifies as a Hard Case. In one case, the tribal court engaged in Stock Incorporation in holding that legislation that prevented convicted criminals from holding public office had a valid legislative purpose and, therefore, did not constitute an ex post facto law.[497] In the second case, *Frost v. Southern Ute Tribal Council*,[498] the

492. I treat bills of attainder and ex post facto laws together because they are frequently overlapping claims. Both involve the "denunciation and condemnation of an individual" by a legislature, "often act[ing] to impose retroactive punishment." Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468 n.30 (1977), *quoted in* MacDonald, Sr. v. Redhouse, 18 Indian L. Rep. 6045, 6047 (Navajo 1991).

493. 16 Indian L. Rep. 6086 (Navajo 1989).

494. *Id.* at 6093.

495. *Id.*

496. 18 Indian L. Rep. 6045 (Navajo 1991).

497. *Id.* at 6046-47 (citing De Veau v. Braisted, 363 U.S. 144 (1960)).

tribal court appears to employ the Tabula Rasa technique. In *Frost*, the chairman of the tribal council decided to investigate the plaintiff, an elected member of the tribal council. A provision of the Southern Ute Constitution provided that the council should establish procedures and regulations for the conduct of removal proceedings, and the tribal council enacted such regulations only a few days after the plaintiff had been served with notice of the removal proceedings. The Plaintiff argued that such proceedings qualified as an ex post facto law. The tribal court rejected the argument on the grounds that another provision of the constitution gave the council investigatory jurisdiction and that the new regulations did not harm the plaintiff but instead expanded his legal rights.[499] The tribal court did not cite federal case law to identify the applicable Legal Test. Another indicator that the court employed Tabla Rasa is the existence of federal case law that squarely decides the issue raised in the case the same way the tribal court did; if the court had known about the federal case law, it likely would have at least cited to it for support.[500]

The final case denying relief was *Colville Confederated Tribes v. Stead*.[501] Three years before the *Stead* decision, the Supreme Court held in *Duro v. Reina*[502] that tribal courts did not have criminal misdemeanor jurisdiction over Indians who were not members of their tribes (known as "non-members"). This decision was contrary to two hundred years of settled law, and Congress quickly responded by enacting temporary, and ultimately permanent, legislation that reversed *Duro*. The temporary legislation was enacted on November 5, 1990, and by its own terms was set to expire on September 30, 1991. Stead, a member of the Rosebud Sioux Tribe, was arrested for driving without a valid driver's license on the Colville Indian Reservation during the time that Congress' temporary legislation was in effect. His trial took place, however, on September 8, 1991, eight days after the temporary legislation expired and one day before Congress enacted a second piece of temporary legislation.[503]

The question before the *Stead* court was whether the trial court had erred in denying Stead's motion to dismiss for want of jurisdiction on the day of the trial. The tribal appellate court held that the trial court had jurisdiction. The appellate court canvassed the federal case law on ex post facto and engaged in Stock Incorporation, but the crux of

498. 23 Indian L. Rep. 6135 (S. Ute Tribal Ct. 1996).

499. *Id.* at 6136.

500. *See* Duncan v. Mo., 152 U.S. 377, 382-83 (1894) (stating that procedural changes in the adjudication of criminal cases may violate ex post facto if they deprive the defendant of substantial protections of law that were in effect when the crime was committed).

501. 21 Indian L. Rep. 6005 (Colville Ct. App. 1993).

502. 495 U.S. 676, 695-96 (1990).

503. Congress ultimately enacted final legislation overturning *Duro* on October 28, 1991.

the tribal court's reasoning did not turn on the niceties of ex post facto doctrine but on the proposition that the Supreme Court decision in *Duro* was incorrect *ab initio* and accordingly could not have extinguished the tribe's inherent authority over non-members; only Congress had the authority to waive the tribe's jurisdiction.[504] The tribal court buttressed its reasoning by quoting legislative history that stated that Congress intended to "[c]larify and reaffirm the inherent authority of tribal government to exercise criminal jurisdiction over all Indians on their reservations," not delegate new powers to the tribes.[505] The tribal court also quoted a federal court decision that similarly had decided that tribes' jurisdiction over non-members "had always existed and . . . continued uninterrupted, despite the *Duro* decision."[506]

Even at an intuitive level, it is difficult to say that the tribal court's decision, which turned on such a difficult legal question, violates the value of Protection.[507] Nor does the analysis change when viewed under the lens of thick political theory. With respect to well-orderedness, the equities pointed strongly in favor of the tribal court exercising jurisdiction because Stead was on notice at the time he engaged in the illegal acts that the tribal court had jurisdiction over him.[508] Nor does the case problematically implicate the exit right, for it was not claimed that the defendant was under the impression that driving without a valid license on the Colville reservation was permissible, and there was no claim that the duration of incarceration was extraordinary.

504. The tribal court made two other arguments, but they are of uncertain legal weight. First, the tribal court noted that Stead had notice of the illegality of his act and of the Colville tribal court's jurisdiction over him at the time he committed his illegal acts. *Stead*, 21 Indian L. Rep. at 6009. While relevant to fundamental fairness, they do not seem to bear on ex post facto analysis. Second, the tribal court stated that Congress' amending legislation did not "disadvantage the appellant by imposing greater punishment for the offense with which Stead was charged than at the time it was committed." *Id.* While technically true, the legislation made punishment possible insofar as under the *Duro* rule no court had jurisdiction to hear misdemeanor offenses of non-members. *Duro*, 495 U.S. at 704-05 (Brennan, J., dissenting). This would appear to run afoul of the rule of *Duncan*, 152 U.S. at 382-83. *See supra* notes 500-03 (discussing this issue).

505. *Stead*, 21 Indian L. Rep. at 6009.

506. *Id.*

507. While it is unclear whether the *Stead* court arrived at what would be the correct answer as a matter of federal constitutional law, it should be kept in mind that the tribe did not have to do so because at issue was ICRA's ex post facto provision; that the tribal court's treatment of federal case law suggests that it tried to adopt federal law is not relevant to whether a decision is a Hard Case.

508. *Stead*, 21 Indian L. Rep. at 6009.

h. *The Treatment of Outsiders*

How tribal courts function when a party is either a non-member of the tribe or a non-Indian (hereinafter an "outsider") is relevant to Protection. After all, there is always a temptation to favor one's own, and resisting this tendency would be a sign of commitment to the rule of law. More cynically, one might attribute a well-behaved tribal judiciary to political accountability or cultural affiliation with affected parties rather than commitment to ICRA. Because these factors are absent when an outsider's interests are involved, outsiders constitute a control group from which inferences can be drawn as to whether commitment to ICRA drives tribal judges.

Unfortunately, it is difficult to generalize about the treatment of outsiders because there is only a small sample of reported cases where outsiders have been parties[509]—ten in total. One of the ten reported cases was resolved in favor of the outsider. Most of the cases are examples of responsible and good faith interpretation of ICRA, and none of the cases involves patently outrageous reasoning or outcomes. Two cases resulted in arguably harsh outcomes but do not appear to be instances in which the outcome was due to the presence of an outsider. Two other cases, however, though readily explicable on innocent grounds, may be instances where the reasoning and outcomes were affected by the presence of outsiders. This subsection reviews the cases from least to most problematic.

The case of *Shohone Business Council v. Skillings*[510] is the one reported decision that found in favor of a technical outsider. After Mr. Skillings had been adjudged to be a member of the Shohone tribe in a trial, the tribal council passed an act stating that Skillings was not a tribal member. The tribal court struck this down on the ground that revoking membership rights announced by a court following a full litigation violated due process.[511] The facts of *Skillings*, however, make it unrepresentative *vis-a-vis* outsiders because the plaintiff had a

509. There is little case law here because tribal powers *vis-a-vis* outsiders are governed largely by non-ICRA doctrines with respect to which there is federal court review. *See supra* notes 32-36 and accompanying text.

510. 22 Indian L. Rep. 6050 (Shohone Ct. App. 1994).

511. *See id.* at 6053 ("Once litigated to final judgment, can rights created by the general council be denied by a later general council? Certainly, succeeding councils may change tribal policy and tribal law, applied prospectively. And, succeeding council may have some effect on the actions of earlier councils in some circumstances. But to hold that a succeeding council may render void in all respects property and other rights created years earlier and fully and finally litigated would deprive individuals of these rights without due process of law and would subject the citizens and residents of the Wind River Reservation to absolute uncertainty."). The *Skillings* court's sophisticated analysis anticipated a similar ruling by the Supreme Court. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 225-27 (1995) (holding that Congress cannot legislatively reopen a case in which an Article III court has rendered a final determination).

cultural connection to the tribe, as evidenced by the fact that the trial court had adjudged him to be a member.

Five of the cases that ruled against the outsiders are not even arguably troublesome. For example, in *Muscogee (Creek) Nation v. American Tobacco Co.*,[512] the tribal court approved of plaintiff's service by mail on the outsider notwithstanding written tribal rules that appeared to require personal service. The court held that due process was not violated because defendants had actual notice and the "well-established procedures of this Court provide the option of service by mail for all papers, including the initial petition."[513] Similarly, in *Means v. District Court of the Chinle Judicial District*[514] the tribal court engaged in Stock Incorporation of United States Supreme Court case law by deciding that an equal protection challenge that the appellant, "as a nonmember Indian, is placed in the classification 'Indian' for criminal prosecution, along with [member] Navajos, when non-Indians are not," should be analyzed under rational basis rather than strict scrutiny. The tribal court found strong reasons to permit the prosecution of non-member Indians, including the fact that about 6.39% of the population of the Navajo reservation was comprised of non-member Indians.[515] The *Means* court's holding is consistent with longstanding federal Indian law that permits tribes to exercise misdemeanor criminal jurisdiction over non-member Indians but not non-Indians,[516] further evidence of the reasonableness of the tribal court's decision.

The other three wholly unproblematic cases raised equal protection and due process challenges to tribes' exertions of power over non-members on the grounds that non-members did not have political representation within the tribe. Two challenges were in the jury context. In *Sanders v. Royal Associates Management, Inc.*[517] and in *Hopi Tribe v. Lonewolf Scott*[518] the tribal courts rejected the argument that tribal juries were inherently unfair because only insiders could be jurors. Both courts observed that this was the only method to ensure that juries constitute a representative cross-sample of the population, which is a legitimate governmental interest.[519] The *Sanders* court also noted that the tribe has "no enforceable authority to order non-

512. 25 Indian L. Rep. 6054 (Muscogee (Creek) Nation D. Ct. 1998).
513. *Id.* at 6059.
514. 26 Indian L. Rep. 6083, 6088 (Navajo 1999).
515. *Id.* at 6084, 6088.
516. *See supra* notes 32-36 and accompanying text.
517. 24 Indian L. Rep. 6068 (Chitimacha Ct. App. 1997).
518. 14 Indian L. Rep. 6001, 6003-4 (Hopi Tribal Ct. 1986). The *Lonewolf* court also was presented with void-for-vagueness and free speech claims. Though the court ruled against the outsider in respect to these arguments as well, the court's reasoning was sound. *See supra* notes 71-73 and accompanying text.
519. *Sanders*, 24 Indian L. Rep. at 6070; *Lonewolf*, 14 Indian L. Rep. at 6004-05.

members to appear for jury duty and serve on" juries.[520] These are reasonable holdings that reflect the same logic that leads States to exclude nondomiciliaries from jury service.[521] Similarly, in *Iron Cloud v. Meckle*,[522] the tribal court rejected the argument that tribal laws violated equal protection and due process because non-members could not vote in tribal elections or hold office. This holding resonates with longstanding federal policy permitting tribes to exercise jurisdiction over non-members for misdemeanor criminal offenses committed on the reservation.[523] Such tribal powers are a product not of consent, but of popular understandings of the inherent nature of tribal sovereignty. For similar reasons, states are permitted to exercise criminal jurisdiction over non-citizens, and the federal government can exercise criminal jurisdiction over aliens.[524]

We now move to two cases that resulted in arguably harsh outcomes but that likely do not signal tribal court disregard of outsiders. Because the sample of cases concerning outsiders is very small, however, these two potentially Hard Cases suggest the need to continue monitoring tribal court treatment of outsiders. In *Gould v. Southern Ute Indian Tribe*,[525] the tribal court upheld against a due process challenge a $6000 tax penalty assessed against an outsider for failing to post a bond. The court held that due process did not require that the tax penalty be proportionate to the actual damage incurred by a party; in fact, the tribe admitted that it had suffered no loss or harm. Though the outcome might be deemed harsh, the ordinance providing for the penalty did not by its terms apply only to outsiders, and there was no basis for believing that the outcome had anything to do with the fact that the appellant was an outsider. The same is true in the case of *Guardianship of Jack J. Schumacher v. Menominee Indian Tribe of Wisconsin*,[526] in which the guardian of a non-Indian's security interest lost the interest because he failed to perfect the interest in accordance with tribal law. Though the tribal court noted that the guardian had been the victim of "sharp dealing," the tribal appellate court demonstrated that the outsider had not been treated under tribal law any differently than an insider would have been.[527]

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520. *Sanders*, 24 Indian L. Rep. at 6070.

521. *See, e.g.*, Cal. Civ. Pro. § 203(3) (2000).

522. 24 Indian L. Rep. 6229 (Standing Rock Sioux Nation Sup. Ct. 1996).

523. *See* 18 U.S.C. §§ 1152-1153; *see also* Mousseaux v. United States Comm'n of Indian Affairs, 806 F. Supp. 1433, 1441-43 (D. S.D. 1992) (approving of tribal prosecution of non-member).

524. *Cf.* Duro v. Reina, 495 U.S. 676, 707 (Brennan, J., dissenting) ("Nor have we ever held that participation in the political process is a prerequisite to the exercise of criminal jurisdiction by a sovereign. If such were the case, a State could not prosecute nonresidents, and this country could not prosecute aliens who violate our laws.").

525. 19 Indian L. Rep. 6129 (S. Ute Tribal Ct. 1992).

526. 24 Indian L. Rep. 6084 (Menominee Sup. Ct. 1997).

527. *Id.* at 6087.

The next case did not create any harsh results—in fact the outcome seems quite fair—but there is room to wonder whether the court would have been less activist had no outsider been involved. In *Thorstenson v. Cudmore*,[528] the issue was how to construe a by-law in the tribal constitution providing that tribal courts have jurisdiction over "disputes or lawsuits . . . between Indians and non-Indians when such cases are brought before it by stipulation of both parties."[529] The outsider argued that the tribal court did not have jurisdiction because his written contract with a member Indian did not contain a provision in which the outsider had expressly stipulated to tribal court jurisdiction. The tribal court held that the contract itself satisfied the "stipulation" requirement. The court relied upon ICRA's due process provision, reasoning that to require an express stipulation would "contravene[] fundamental Lakota cultural notions of fair play that allow people the opportunity to be heard, which includes the right to have 'their day in court.'"[530] The court went on to state that to understand the stipulation requirement otherwise would

> offend[] basic notions of due process in that it potentially creates situations in which the tribe affirmatively regulates the (civil) conduct of private parties (both Indian and non-Indian) on the reservation but permits or condones the inability of injured parties to seek to enforce or to vindicate (through civil litigation) the very legal norms the tribe expects them to comply with. You cannot, it seems to this court, establish legal norms to regulate civil conduct, but then effectively place the opportunity to pursue remedial redress in the hands of the alleged "wrongdoer." If due process means anything, it must, at its most fundamental level, mean that the duty to obey the civil law carries with it the necessary correlative of access to the appropriate (tribal) forum to be heard.[531]

These are all reasonable arguments, but the fact remains that the *Cudmore* court adopted an activist approach. One can only speculate as to whether the tribal court's analysis was affected by the fact that an outsider was involved. On the other hand, as shown by the numerous tribal court cases surveyed above that employed activist reasoning when the parties were insiders, the mere fact of judicial activism certainly does not mean that the tribal court acted differently because an outsider was a party.

The most problematic case, *Public Service Co. of New Mexico v. Tax Protest Panel*,[532] resulted in a harsh outcome for the outsider. It is

528. 18 Indian L. Rep. 6051 (Cheyenne River Sioux Ct. App. 1991).
529. *Id.* at 6052 (emphasis omitted).
530. *Id.* at 6054.
531. *Id.* The court also noted that although the by-law was part of the tribal constitution, the constitution had been prepared "almost in boilerplate fashion" by the Bureau of Indian Affairs, "without any meaningful input or discussion at the local tribal level." *Id.* at 6053.
532. 18 Indian L. Rep. 6097 (Jicarilla App. Ct. 1991).

unclear, however, whether the court's holding was due to the fact that one of the parties was an outsider. In *Tax Protest Panel*, the tribal court determined that a seven percent possessory interest tax assessed against the value of property owned by a public utility that passed through a reservation did not violate equal protection.[533] The tribal court engaged in Stock Incorporation, adopting the rule that equal protection precludes classification of taxpayers based on residence. The court determined that the tax at issue classified property on the basis of usage, which under federal law is subject to only rational basis scrutiny, and the tribal court was able to identify rationales that justified exemptions for retail businesses and homes.

The problem not recognized by the court was that the rationales turned on considerations virtually metonymic with residency. For example, the court explained that the retail business and home exemption "seems to be intended to facilitate (or at least not penalize) the building of homes, renovation of existing homes, and location of jobs on the reservation" and justified the exemptions for consumer businesses as methods to "preserve the existing services for the community as well as to encourage location of new services into the community."[534] Thus, virtually no possessory interest tax that in effect differentiated between insiders and outsiders would be struck down under the *Tax Protest Panel* court's reasoning. Nevertheless, the near-toothless standard adopted by the tribal court may have been a good faith determination that, as the tribal court correctly noted and the United States Supreme Court has held, high deference is appropriate in the area of local taxation.[535] High deference alone does not signal an absence of good faith; the United States Supreme Court also sometimes applies rational basis scrutiny in a manner that makes it virtually impossible for a statutory scheme to be found unconstitutional.[536]

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533. The tribal court also rejected a second set of due process and equal protection arguments, but these holdings appear to be wholly unproblematic. Plaintiff outsiders sought to challenge the tribe's 1988 and 1989 tax assessments but failed to meet procedural requirements for challenging the 1989 payments. Plaintiff argued that enforcing the tribe's procedural deadlines would violate due process and equal protection because they never before had been enforced. The tribal court noted that the tax code and its administrative procedures for challenging assessments was "relatively new" and that circumstances that "result[] in a taxpayer becoming the first to run afoul of a clear requirement is not cause to excuse the breach." *Id.* at 6099-6100.

534. *Id.* at 6101.

535. *See, e.g.*, Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) ("Unless a classification abridges fundamental personal rights or is based on inherently suspect distinctions such as race, religion or alienage, the statutory distinction is valid if it is rationally related to a legitimate governmental interest.").

536. *See, e.g.*, United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 187 (1980) (Brennan, J., dissenting) ("[B]y presuming purpose from result, the Court reduces analysis to tautology. It may always be said that Congress intended to do what it in fact did. If that were the extent of our analysis, we would find every statute, no matter

In short, although there is only limited case law concerning outsiders, the bulk, if not the entirety of the cases, conforms to the pattern of responsible and good faith interpretation and application of ICRA observed in insider cases. Two cases, however, may be instances where tribal court dispositions were affected by the presence of outsiders, and for this reason the treatment of outsiders, while not demonstrably problematic, merits additional attention as the case law develops over time. For purposes of this Article, however, the fact that the bulk of the case law concerning outsiders appears to be well-functioning constitutes provisional additional evidence that tribal courts have worked well because there is no indication that tribal courts have succumbed to the temptation to favor the insider at the expense of outsiders. Furthermore, the outsider jurisprudence suggests that factors aside from political accountability and cultural affiliation have led tribal courts to engage in good faith attempts to apply ICRA, because these factors are not present when a party is an outsider.

V. LESSONS TO BE DRAWN FROM THE ICRA STUDY

This final Part summarizes the conclusions that can be drawn from the study of ICRA case law and then identifies the lessons that can be learned from it, both in respect of the possibility of multiple authoritative interpreters of American constitutional law and also *vis-a-vis* three important issues in federal Indian law.

A. *Summary*

There is strong preliminary evidence that ICRA is a well-functioning regime of multiple authoritative interpreters, although a definitive determination requires access to more case law than is publicly available at the present time. The ICRA regime has realized the potential benefits of institutional diversity and sustaining valuable idiosyncratic communities because it allows for the creation of doctrines and institutions that protect the distinctive needs and values of Native Americans. The regime also has let the tribes transform their community narratives and self-understandings from mere literature to law, lending these narratives and self-understandings the weight, socializing power, and coercive potential that characterize law. This also has supported tribal culture. Furthermore, ICRA has provided extraordinary opportunities for self-governance, even though it has constrained tribal autonomy by imposing Anglo political values. The final potential benefit of regimes of multiple authoritative

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how arbitrary or irrational, perfectly tailored to achieve its purpose."); Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 Yale L.J. 123, 128 (1972) (arguing that "[i]t is always possible to define the legislative purpose of a statute in such a way that the statutory classification is rationally related to it").

interpreters, spurring general society's legal imagination, has not been met because of unawareness of ICRA outside of a small cadre of scholars and practitioners of Native American law.

The costs in Indian country associated with regimes of multiple authoritative interpreters do not appear to be excessive. The review of the legal doctrines tribal courts have created, as well as their methods of interpretation, suggests that tribal courts have interpreted the ICRA in good faith, a necessary though not sufficient condition for the containment of costs to Protection. ICRA has been deployed to require significant changes in tribal governmental practices and to create extensive rights for individuals. Tribal courts take federal case law seriously and tend to deviate from federal doctrines only for good reasons. In fact, tribal courts have deeply assimilated many Anglo constitutional values. A full analysis of whether ICRA's regime of multiple authoritative interpreters secures or undermines Protection, though, requires recourse to a thick political theory. Under a Rawlsian analysis, the tribal case law has fared well. There are no outcomes that flatly violate Protection, and only one case's reasoning is clearly problematic. With respect to the ancillary potential costs that attend regimes of multiple authoritative interpreters, externalities are minimal because non-ICRA doctrines significantly curtail tribal court jurisdiction over outsiders and because the ICRA provisions concern conduct that is almost entirely localized within Indian country. When tribal courts do have jurisdiction over outsiders, there does not appear to be a pattern of abuse with respect to the outsiders who are pressing the ICRA claims.

B. *Multiple Authoritative Interpreters of the Constitution*

Assuming for present purposes that there exists a doctrinal mechanism for creating community-based courts that are functionally analogous to tribal courts,[537] this Article's findings concerning the operation of a regime of multiple authoritative interpreters are highly relevant to the non-Indian communities that would be the beneficiaries of such community-based courts. There is little doubt that the benefits enjoyed by Native Americans would be enjoyed by non-Indian communities, for it is virtually tautological that a regime of multiple authoritative interpreters would expand institutional diversity, extend the range of communities that could flourish, increase the range of possible self-government, and spur the legal imagination if knowledge of the regime's law were widely disseminated.

537. I hope to provide a full treatment of the doctrinal feasibility of creating such community-based courts in the future. *See* Rosen, *Limited Community-Based Interpretation*, *supra* note 7.

The difficult question is to what extent the contained nature of the costs observed in the ICRA regime would carry over to non-Indian communities. While it is impossible to draw any incontrovertible inferences concerning costs from the practice of one set of communities to another, several factors suggest that the lessons from the ICRA experience are transferable. Suggestive though not dispositive, the ICRA jurisprudence actually provides more than one example of contained costs because each tribe's judiciary has final and authoritative interpretive power of ICRA's provisions, and the tribal case law confirms that the tribes' courts operate largely independently of one another.[538] While this observation does not fully answer the question of transferability because these are all *tribal* communities, consistency of cost containment across multiple independent communities makes generalizing the phenomenon of cost containment more plausible. Furthermore, the contained costs cannot be attributed to tribal predisposition to Anglo traditions. Just the opposite is true: at the time ICRA was passed, most tribes opposed it because it was yet another instance of federal encroachments on tribal sovereignty.[539] The ICRA experience, therefore, cannot be explained away as being unrepresentative of the nonconformist groups that would likely seek the benefits of partially nonuniform constitutionalism. Nor can it be maintained that tribal values fortuitously coincide with Anglo values. While there is some important overlap in respect of values of democracy and fair processes, many tribal norms differ from federal constitutional values in important respects.[540]

Another respect in which Native American tribes might be said to differ from other communities that may seek access to regimes of multiple authoritative interpreters is that Native Americans were not a "single issue" group whose rulings on ICRA's provisions could be readily predicted. By contrast, one can readily predict how some groups would rule on certain issues were they permitted to authoritatively and independently render constitutional interpretations for their communities.[541] This difference between

538. Tribal courts only infrequently cite to other tribal courts and typically utilize such opinions only for guidance when they do so. *See, e.g.*, Rave v. Reynolds, 22 Indian L. Rep. 6137, 6139 (Winnebago Tribal Ct. 1995) (noting that other tribes' holdings are "not binding on this court").

539. *See* Commission Report, *supra* note 99, at 8-9; Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 Harv. J. on Legis. 557, 557-58 (1972).

540. *See* Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part II)*, 46 Am. J. Comp. L. 509, 511-58 (1998).

541. Consider, for example, the Rajneesh, who believed that practice of their religion required that they live separately from others in a homogeneous society, purchased undeveloped land, and built and incorporated a city on it, only to have the incorporation of the city struck down under the Establishment clause. Rosen, *Outer Limits*, *supra* note 7, at 1082-84. Had they been permitted to authoritatively interpret

Native Americans and other communities, however, may be more imagined than real because there are deeply held, identifiable norms in tribal communities[542] that provide a basis for predicting judicial outcomes. More fundamentally, such predictability is irrelevant. The real issue is the normative question, answered by a thick political theory, of which groups ought to be granted significant powers of self-governance and to what extent. Once that is answered, it is irrelevant if the judicial outcomes correlate to the community's readily identifiable prior commitments.

In short, the tribal courts would appear to constitute a representative model of how a regime of multiple authoritative interpreters can be expected to function in practice. The benefits of such a regime observed in tribal courts are probably wholly transferable to non-tribal communities. Factors such as the numerosity and distinctiveness of tribal communities suggest that the ICRA regime also is representative *vis-a-vis* the possibility of containing the costs associated with regimes of multiple authoritative interpreters, although the precise degree of transferability ultimately turns on the specific characteristics of the community in question. At the very least, however, there are good reasons to believe that the tribal experience with multiple authoritative interpreters is not wholly *sui generis*.[543]

C. *Native American Law*

This Article's findings also clarify several important issues in the field of American Indian law. Two of the issues have arisen in the context of the limited matters over which federal courts have subject matter jurisdiction under ICRA. First, some federal courts have failed to understand that legal rights such as "due process" may look different in Indian country. For example, in response to the argument that due process protections of Native Americans against tribal governments are different from the due process protections of non-Indians in general American society, the United States Court of Appeals for the Second Circuit recently replied "there is simply no room in our constitutional order for the definition of basic rights on the basis of cultural affiliations."[544] This Article's empirical study corrects this severe misconception.

Second, even among those federal courts that have not made the Second Circuit's error, some have held that variations from federal doctrines are permissible only when the Indian practice being

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the First Amendment, it is not difficult to predict how they would have ruled.

542. *See* Cooter & Fikentscher, *supra* note 540, at 511-58.

543. Rosen, *Limited Community-Based Interpretation*, *supra* note 7, at 80-125.

544. Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 900-01 (2d Cir. 1996).

challenged "differ[s] significantly from those 'commonly employed in Anglo-Saxon society.'"[545] But when tribes adopt procedures akin to those found in general society, these courts have held, the tribes are subject to the ordinary federal requirements imposed by due process, equal protection, and so forth.[546] The federal courts that have adopted this approach have not offered a theoretical justification for it, and this Article's analysis suggests several notable problems with it. Because it is premised on the view that only gross variations from Anglo approaches are of importance to Indian tribes, the approach is mistaken; Tailoring can be very important, in that it creates important doctrinal variations, and even Incorporation can generate important benefits for the tribes. Further, this approach provides an incentive for tribes to avoid procedures akin to Anglo procedures, threatening to interfere with the assimilation and valuable cultural syncretism that otherwise occurs. Finally, requiring tribes to adopt federal approaches undermines the assimilation and syncretism that ordinarily accompany tribal court interpretation of ICRA.

Third, and perhaps most importantly, this Article's findings counsel strongly against the proposals advanced by some commentators and members of Congress that federal court jurisdiction over ICRA be expanded, or tribal court jurisdiction curtailed, because tribal courts have not responsibly interpreted ICRA.[547] The concerns purportedly prompting these proposals are based on anecdotal evidence.[548] Close examination of the tribal case law suggests that they are grossly overstated if not entirely misplaced.[549] The study suggests that

545. Randall v. Yakima Nation Tribal Court, 841 F.2d 897, 900 (9th Cir. 1988) (citation omitted).

546. *Id.* (due process); Howlett v. Salish and Kootenai Tribes of Flathead Reservation, 529 F.2d 233, 238 (9th Cir. 1976) (equal protection).

547. *See, e.g.*, The American Indian Equal Justice Act, S. 1691, 105th Cong. § 7 (1998), *reprinted in* 144 Cong. Rec. S1,155-56 (daily ed. Feb. 27, 1998) (bill introduced by Senator Gorton to grant federal district courts jurisdiction to hear all ICRA claims concerning nonmembers); 134 Cong. Rec. S11,656 (daily ed. Aug. 11, 1988) (statement of Senator Hatch regarding proposed bill to grant federal courts jurisdiction over ICRA claims); Carla Christofferson, Note, *Tribal Courts' Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act*, 101 Yale L.J. 169, 181 (1991) (advancing proposal to expand federal court jurisdiction over ICRA claims).

548. *See* Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 Am. Indian L. Rev. 285, 285-88 (1998) (making this point); Christofferson, *supra* note 547, at 170, 178-79 (relying entirely on statement of one woman to conclude that tribal court application of ICRA has not adequately protected Native American women).

549. The handful of studies of tribal case law have come to similar conclusions. One study of tribal case law that examined a small sample of ICRA jurisprudence has concluded that "[t]he evidence suggests that efforts to strip tribes of sovereign immunity or to greatly expand federal review of tribal courts are overbroad remedies for an exaggerated problem, unfairly based on anecdote and cultural prejudice." Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 Idaho L. Rev. 465, 513 (1998). An article by Dean Newton that did not

ICRA's regime of multiple authoritative interpreters has worked well. Tribal courts have found significant individual protections in ICRA even though they express the values of due process, equal protection, and so on, in ways that reflect and support tribal culture. This finding casts doubt on the wisdom of curtailing the powers of the tribal courts. To be sure, the study's conclusions in this regard are limited due to the restricted sample of available tribal case law. At the very least, however, the study's findings suggest that additional research be done, or that changes, like requiring publication of tribal court decisions, be implemented before drastically limiting tribal court jurisdiction.[550]

CONCLUSION

Long ago, Justice Story's majority opinion for the Supreme Court rejected out-of-hand as self-evidently "deplorable" the prospect of multiple authoritative interpreters of the constitution at the sub-federal level. There may, however, be compelling high level philosophical reasons to allow select communities the power to authoritatively construe for themselves a limited number of constitutional provisions, and there may be a doctrinal mechanism for creating "community-based" courts that are so empowered. In light of these considerations, probing Justice Story's untested assumption by empirically considering what a regime of multiple authoritative interpreters would look like in practice is critical for at least two reasons. First, deplorable practical outcomes would weigh heavily against creating community-based courts, even if there were high level reasons counseling in their favor. Second, an assessment of the likely practical consequences is relevant as a doctrinal matter to determining the constitutionality of creating such community-based courts in the first place.

Today's tribal courts in Indian country provide a ready laboratory for empirically investigating what a regime of multiple authoritative interpreters of select constitutional provisions might look like. Tribal courts have the power to authoritatively interpret quasi-constitutional federal provisions of ICRA, such as due process, equal protection, and free exercise. Tribal court interpretations need not mirror federal courts' interpretations of the Bill of Rights. Instead, the tribes' interpretations can be based on tribal customs, values, and needs.

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focus on ICRA but examined one year's reported cases in the Indian Law Reporter concluded that tribal courts "have been highly successful" in "engraft[ing] Western legal principles onto their consensual form of decision making." Newton, *supra* note 548, at 353. A student Note that examined some tribal court definitions of due process concluded that *Martinez's* goal of enabling tribal courts to protect tribal traditions "has been successfully implemented, though perhaps only at a conceptual level." Christian M. Freitag, Note, *Putting Martinez to the Test: Tribal Court Disposition of Due Process*, 72 Ind. L.J. 831, 833 (1997).

550. *Cf.* Commission Report, *supra* note 99, at 72-73 (making similar suggestion).

Moreover, the tribes' opinions are almost wholly free of federal appellate court review. These characteristics make the ICRA regime an excellent analogue of community-based courts that were entitled to offer independent interpretations of select constitutional provisions.

This Article created analytical tools for analyzing the costs and benefits of the ICRA regime of multiple authoritative interpreters, and applied these tools to thirteen years of tribal court case law. The ICRA case law illustrates many of the potential benefits of a regime of multiple authoritative interpreters. The ICRA regime has allowed for the creation and maintenance of novel legal doctrines and governmental institutions that have facilitated the well-being of the tribal communities and their distinctive values. This regime has also allowed the tribes to transform their community narratives and self-understandings from mere literature to law, thereby supporting tribal culture by lending these narratives and self-understandings the importance, socializing power, and coercive potential that characterize law.

The ICRA case law also suggests that the potential costs associated with regimes of multiple authoritative interpreters can be reasonably contained. The tribal courts have interpreted ICRA's provisions in good faith. The courts have created strong rights-protecting doctrines that significantly constrain tribal governments even as the courts have given idiosyncratic interpretations of ICRA's provisions that reflect and advance tribal concerns. The ICRA case law displays a cultural syncretism of Anglo and tribal values. Finally, there is strong evidence that tribal courts have deeply assimilated many fundamental Anglo jurisprudential values.

For these reasons, this Article's findings strongly counsel against several proposals to sharply curtail tribal court jurisdiction under ICRA that have been advanced by some politicians and academic commentators based largely on anecdotal evidence. More generally, the ICRA case law showcases the effects of granting diverse communities the power to independently and authoritatively construe identical legal texts. Shared texts, such as due process and equal protection, help to create a common, nation-wide culture. Yet the power to offer independent interpretations simultaneously allows diverse communities the opportunity to maintain, and even advance, their distinctive cultures. Although it is impossible to definitively conclude that the tribal experience under ICRA would transfer seamlessly to other communities, there are strong reasons to think that the tribal experience is largely representative. At the very least, the ICRA case law casts considerable doubt on Justice Story's untested conviction that a regime of multiple authoritative interpreters of constitutional law unquestionably would be "deplorable."

APPENDIX: RAW DATA

Case	Year	Victorious Party	Due Process	Equal Protection	Search & Seizure	Free Speech	Assembly	Free Exercise	Right To Petition	Jury	Counsel	Speedy Trial	Nature & Cause of Accusation	Compulsory Process	Self Incrimination	Double Jeopardy	Takings	Cruel & Unusual	Bill of Attainder	Ex Post Facto
14 ILR 6001	1986	G	1	1		1														
14 ILR 6011	1987	P	1																	
14 ILR 6029	1987	P				1														
14 ILR 6029	1987	G	1																	
15 ILR 6007	1988	G	1																	
15 ILR 6010	1987	G	1							1										
15 ILR 6023	1988	P	1																	
15 ILR 6029	1988	G									1									
15 ILR 6032	1988	P	1																	
15 ILR 6041	1988	P	1															1		
16 ILR 6005	1988	G									1	1								
16 ILR 6017	1988	G	1																	
16 ILR 6037	1984	P		1																
16 ILR 6042	1986	P	1																	
16 ILR 6044	1989	P	1																	
16 ILR 6054	1985	P	1																	
16 ILR 6057	1988	G	1	1																
16 ILR 6061	1988	P						1												
16 ILR 6084	1989	P	1	1																
16 ILR 6086	1989	G																	1	
16 ILR 6086	1989	P	1																	
16 ILR 6093	1989	P	1																	
16 ILR 6136	1989	P								1										
16 ILR 6151	1989	G		1																
17 ILR 6010	1989	P	1	1																
17 ILR 6010	1989	G		1																
17 ILR 6027	1989	P												1						
17 ILR 6030	1990	P																1		
17 ILR 6051	1990	P	1																	
17 ILR 6085	1988	P	1	1																
17 ILR 6115	1990	G															1			
17 ILR 6124	1990	G	1														1			
17 ILR 6151	1990	G	1																	

Case	Year	Victorious Party	Due Process	Equal Protection	Search & Seizure	Free Speech	Assembly	Free Exercise	Right To Petition	Jury	Counsel	Speedy Trial	Nature & Cause of Accusation	Compulsory Process	Self Incrimination	Double Jeopardy	Takings	Cruel & Unusual	Bill of Attainder	Ex Post Facto
18 ILR 6003	1990	P													1					
18 ILR 6009	1990	P		1																
18 ILR 6010	1990	P	1																	
18 ILR 6014	1990	G	1																	
18 ILR 6018	1990	G	1																	
18 ILR 6026	1991	G	1																	
18 ILR 6031	1991	G	1																	
18 ILR 6045	1991	G																	1	1
18 ILR 6049	1990	G			1															
18 ILR 6051	1991	P	1																	
18 ILR 6055	1990	G	2																	
18 ILR 6058	1991	P		1																
18 ILR 6071	1991	P	1																	
18 ILR 6091	1990	G			1															
18 ILR 6097	1991	G	1	1																
18 ILR 6105	1991	G			1															
18 ILR 6115	1991	P							1											
18 ILR 6117	1991	G			1															
18 ILR 6126	1990	P	1																	
18 ILR 6131	1991	P	1	1																
18 ILR 6139	1991	G				1														
18 ILR 6141	1991	G													1					
18 ILR 6147	1991	P	1																	
19 ILR 6001	1991	G	1		1															
19 ILR 6009	1990	G		1																
19 ILR 6026	1991	P													1					
19 ILR 6027	1991	P														1				
19 ILR 6040	1991	G	1	1																
19 ILR 6049	1991	P	1																	
19 ILR 6053	1991	G									1							1		
19 ILR 6067	1991	G								1										
19 ILR 6078	1992	P	1																	
19 ILR 6079	1992	G									1	1						1		
19 ILR 6079	1992	P													1					
19 ILR 6088	1992	G	1	1																

Case	Year	Victorious Party	Due Process	Equal Protection	Search & Seizure	Free Speech	Assembly	Free Exercise	Right To Petition	Jury	Counsel	Speedy Trial	Nature & Cause of Accusation	Compulsory Process	Self Incrimination	Double Jeopardy	Takings	Cruel & Unusual	Bill of Attainder	Ex Post Facto
19 ILR 6090	1992	G	1	1																
19 ILR 6091	1992	G													1					
19 ILR 6093	1992	G	1																	
19 ILR 6095	1992	P	1																	
19 ILR 6097	1992	G	1																	
19 ILR 6112	1992	G	1																	
19 ILR 6113	1992	G							1											
19 ILR 6129	1992	G	1																	
19 ILR 6130	1992	G	1																	
19 ILR 6136	1992	P	1																	
20 ILR 6015	1993	P	1																	
20 ILR 6020	1993	P	1																	
20 ILR 6020	1993	G	1																	
20 ILR 6026	1993	G								1										
20 ILR 6049	1986	G								1										
20 ILR 6049	1993	G										1								
20 ILR 6049	1993	P	1																	
21 ILR 6005	1993	G	1	1																1
21 ILR 6035	1990	P	1																	
21 ILR 6040	1994	G																1		
21 ILR 6045	1992	P							1											
21 ILR 6053	1991	G									1									
21 ILR 6079	1994	G			1															
21 ILR 6079	1994	P			1															
21 ILR 6080	1994	G	1	1																
21 ILR 6085	1992	G	1								1									
21 ILR 6089	1994	G								1										
21 ILR 6090	1992	P	1																	
21 ILR 6115	1994	P										1								
21 ILR 6136	1994	P	1																	
21 ILR 6138	1994	G			1															
21 ILR 6139	1992	P	1																	
22 ILR 6002	1993	P	1																	
22 ILR 6007	1993	G		1					1											
22 ILR 6012	1993	G	1																	

Case	Year	Victorious Party	Due Process	Equal Protection	Search & Seizure	Free Speech	Assembly	Free Exercise	Right To Petition	Jury	Counsel	Speedy Trial	Nature & Cause of Accusation	Compulsory Process	Self Incrimination	Double Jeopardy	Takings	Cruel & Unusual	Bill of Attainder	Ex Post Facto
22 ILR 6015	1994	G	1																	
22 ILR 6016	1994	P	2	1																
22 ILR 6016	1994	G	1	1																
22 ILR 6037	1995	G										1								
22 ILR 6039	1995	P	1																	
22 ILR 6044	1995	P	1																	
22 ILR 6050	1994	P	1																	
22 ILR 6059	1995	G	1																	
22 ILR 6065	1995	G	1																	
22 ILR 6071	1995	P			1															
22 ILR 6072	1995	P								1										
22 ILR 6097	1995	P	1																	
22 ILR 6102	1995	P	1																	
22 ILR 6119	1994	P	1																	
22 ILR 6127	1995	G	1																	
22 ILR 6135	1995	P	1																	
22 ILR 6137	1995	G							1											
22 ILR 6145	1995	P								1										
22 ILR 6148	1994	G	1																	
22 ILR 6162	1995	P	1																	
23 ILR 6008	1995	G	1																	
23 ILR 6021	1995	P				1	1													
23 ILR 6037	1996	P	1																	
23 ILR 6039	1996	P	1																	
23 ILR 6039	1996	P	1																	
23 ILR 6039	1996	G		1																
23 ILR 6055	1993	P	1																	
23 ILR 6081	1996	P	1																	
23 ILR 6094	1996	G	1																	
23 ILR 6120	1996	P	1																	
23 ILR 6135	1996	G		2																1
23 ILR 6150	1996	G				1														
23 ILR 6181	1996	P	1																	
23 ILR 6204	1996	P											1							
23 ILR 6235	1996	P	2																	

Case	Year	Victorious Party	Due Process	Equal Protection	Search & Seizure	Free Speech	Assembly	Free Exercise	Right To Petition	Jury	Counsel	Speedy Trial	Nature & Cause of Accusation	Compulsory Process	Self Incrimination	Double Jeopardy	Takings	Cruel & Unusual	Bill of Attainder	Ex Post Facto
24 ILR 6001	1996	G	1																	
24 ILR 6013	1996	P	1																	
24 ILR 6015	1996	G	1																	
24 ILR 6017	1996	P	1																	
24 ILR 6027	1996	P				1														
24 ILR 6039	1996	G	1																	
24 ILR 6045	1998	G	1																	
24 ILR 6068	1997	G									1									
24 ILR 6084	1997	G	1	1																
24 ILR 6087	1996	G	1																	
24 ILR 6109	1996	P	1																	
24 ILR 6126	1996	P	1																	
24 ILR 6137	1997	G									1									
24 ILR 6139	1996	P	1																	
24 ILR 6154	1997	G	1																	
24 ILR 6170	1997	G	1																	
24 ILR 6179	1997	G	1																	
24 ILR 6182	1996	P	1																	
24 ILR 6227	1996	G	1																	
24 ILR 6229	1996	G	1	1																
24 ILR 6231	1997	G		1																
24 ILR 6232	1997	G		1																
24 ILR 6240	1997	P			1															
24 ILR 6246	1997	G	1																	
25 ILR 6011	1996	P	1																	
25 ILR 6015	1996	P	1																	
25 ILR 6021	1997	P		1																
25 ILR 6022	1997	P		1																
25 ILR 6042	1997	P	1																	
25 ILR 6045	1998	G			1															
25 ILR 6054	1998	G	1																	
25 ILR 6062	1997	P		1																
25 ILR 6079	1997	G	1																	
25 ILR 6083	1998	P	1																	
25 ILR 6107	1995	P			1															

Case	Year	Victorious Party	Due Process	Equal Protection	Search & Seizure	Free Speech	Assembly	Free Exercise	Right To Petition	Jury	Counsel	Speedy Trial	Nature & Cause of Accusation	Compulsory Process	Self Incrimination	Double Jeopardy	Takings	Cruel & Unusual	Bill of Attainder	Ex Post Facto
25 ILR 6108	1995	P														1				
25 ILR 6116	1998	G	1																	
25 ILR 6121	1997	P		1		1														
25 ILR 6131	1998	G			1															
25 ILR 6133	1998	P	1																	
25 ILR 6144	1995	P	1																	
25 ILR 6163	1996	P	1										1		1					
25 ILR 6180	1998	G	1																	
25 ILR 6181	1998	G	1																	
25 ILR 6181	1998	P															1			
25 ILR 6183	1996	P	1																	
25 ILR 6197	1997	P	1																	
25 ILR 6212	1997	P									1									
25 ILR 6213	1996	G	2									1								
25 ILR 6224	1997	P									1									
25 ILR 6229	1998	G		1																
25 ILR 6229	1998	P														1				
25 ILR 6245	1998	G	1																	
25 ILR 6253	1998	G	1																	
26 ILR 6005	1998	G	1																	
26 ILR 6011	1998	P	1																	
26 ILR 6013	1998	G	1																	
26 ILR 6015	1997	P													1					
26 ILR 6028	1998	P	1																	
26 ILR 6029	1998	G	1																	
26 ILR 6032	1998	G	1	1																
26 ILR 6061	1999	G	2																	
26 ILR 6063	1999	G	1																	
26 ILR 6073	1999	P	1																	
26 ILR 6080	1999	P	1																	

Case	Year	Victorious Party	Due Process	Equal Protection	Search & Seizure	Free Speech	Assembly	Free Exercise	Right To Petition	Jury	Counsel	Speedy Trial	Nature & Cause of Accusation	Compulsory Process	Self Incrimination	Double Jeopardy	Takings	Cruel & Unusual	Bill of Attainder	Ex Post Facto
26 ILR 6083	1999	G		1																
Total Claims	249		134	35	13	7	1	1	5	10	9	6	2	1	8	4	3	5	2	3
Government Victorious	134		65	23	9	3	0	0	3	7	6	5	0	0	3	0	2	3	2	3
Private Party Victorious	115		69	12	4	4	1	1	2	3	3	1	2	1	5	4	1	2	0	0
Total Cases	194																			